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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

In the Matter of:
Penn Central Transportation Company

AMERICAN PREMIER UNDERWRITERS, INC.,

Petitioner,

—v.—

USX CORPORATION and BESSEMER and
LAKE ERIE RAILROAD COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Dated: March 25, 1996

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QUESTIONS PRESENTED

1. Should the conflict among circuits as to when a claim exists under federal bankruptcy law be resolved by adopting the holding of the Third Circuit Court of Appeals below that a claim exists only when it accrues under the vagaries of varying state statute of limitations principles, or by adopting holdings of the Fourth, Seventh and Ninth Circuit Courts of Appeals that a claim exists when uniform federal bankruptcy principles dictate that the claimant should be required to assert it so that it can be resolved equitably in relation to other creditors' claims and discharged to accomplish the fundamental bankruptcy policies of fairness among creditors and finality and a fresh start for the reorganized company?

2. Whether, as the court below held, claims for indemnification and contribution by a joint tort-feasor against a reorganized company are not discharged in its bankruptcy proceeding solely because they did not accrue for state statute of limitations purposes until payment by the joint tort-feasor to plaintiffs, which occurred after consummation of the bankruptcy, even though the joint tort-feasor should fairly have contemplated such possible future claims at the time that it filed other claims in the bankruptcy proceeding and these identical claims would have been discharged in the Fourth, Seventh, and Ninth Circuits?

3. Should the myriad, divergent approaches employed by those lower federal courts that apply federal bankruptcy principles to determine when a claim exists be resolved by adopting the "conduct test", the "pre-petition relationship test", the "fair contemplation test", or some other standard?

RULE 29.1 STATEMENT

The Supreme Court Rule 29.1 Statement of Petitioner American Premier Underwriters, Inc. is contained in Appendix A. (Pet. App. A)

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner, American Premier Underwriters, Inc. ("Penn Central"),[1] requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on December 12, 1995.

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[1] Penn Central Transportation Company petitioned for reorganization in 1970 and emerged from the reorganization as The Penn Central Corporation in 1978. In 1994, The Penn Central Corporation changed its name to American Premier Underwriters, Inc.

OPINIONS BELOW

The panel opinion of the Court of Appeals (Pet. App. B) is reported at 71 F.3d 1113 (3d Cir. 1995). The denial of a petition for rehearing and suggestion for rehearing en banc (Pet. App. C) is unreported. The Memorandum and Order of the District Court (Pet. App. D) is unreported.

GROUNDS FOR JURISDICTION

The judgment of the Court of Appeals was entered on December 12, 1995. The order of the Court of Appeals denying rehearing and suggestion for rehearing en banc was entered on February 16, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

United States Code, Title 11, § 205(b) (repealed in 1978):

> "The term 'claims' includes debts, whether liquidated or unliquidated, securities . . . liens, or other interests of whatever character."

United States Code, Title 11, § 101(5):[2]

> "claim" means—(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; . . .

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[2] 11 U.S.C. § 101 was amended in 1994 which changed the number of subsection (4) to subsection (5). The amendment did not change the language defining "claim" in those subsections. Petitioner will refer to the old subsection (4) where a decision was rendered thereunder.

STATEMENT OF THE CASE

The Third Circuit below—in direct conflict with three other circuits that have considered the same issue—determined that, with rare exceptions, a claim exists for federal bankruptcy purposes only when it has accrued so as to begin the running of the statute of limitations under the state or federal substantive law creating the claim. Since most bankruptcy claims arise under substantive state law, *see Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 170-71 (1946) (Frankfurter, J., concurring), this means that such fundamental questions in bankruptcy as whether a claim can be resolved in a pending reorganization proceeding, whether a claimant is stayed from asserting it outside the proceeding, and whether it is discharged upon confirmation of the plan of reorganization, all turn on the vagaries of the statute of limitations principles of whichever state law applies. Under the Third Circuit rationale, identical claims could receive inconsistent treatment—one being discharged and the other surviving bankruptcy to be asserted against the reorganized company—simply because they arose in different states with different rules as to when a claim accrues.

By contrast, the Fourth, Seventh, and Ninth Circuits have held that whether such a claim exists is governed by uniform federal bankruptcy law, not varying state limitations standards. These courts have held that accrual principles of state law are irrelevant and inappropriate standards for determining when a claim exists under federal bankruptcy law. Unfortunately, these and other circuit courts which apply uniform national bankruptcy law have adopted differing rules to determine when a claim exists under that law. Thus, it is important for this Court to resolve two issues presented by this case: whether varying state statute of limitations laws or a uniform federal bankruptcy law applies to determine whether a claim exists and, if the latter, what that uniform bankruptcy rule should be. If this Court determines, as petitioner urges, that

a uniform federal bankruptcy law applies and requires assertion of a contingent claim in a bankruptcy proceeding if the claimant has a reasonable basis to anticipate that such claim may arise in the future, then the decision below must be reversed.

A. Factual and Procedural Background

In 1970, Penn Central filed a petition for reorganization under Section 77 of the Bankruptcy Act. A Consummation Order was entered, effective October 24, 1978, which transferred the debtor's assets to the reorganized Penn Central "free and clear" of all claims, "discharged and released" the debtor from all liabilities and claims, and permanently enjoined claims against the reorganized company based upon the acts or conduct of the debtor.

Various antitrust actions were brought in the 1980's against respondent Bessemer & Lake Erie Railroad Company ("B&LE"), Penn Central and other railroad companies for violation of the Sherman Act and the similar Ohio Valentine Act alleging that defendants conspired to restrain trade in the dock handling, storage and land transportation of iron ore along lower Lake Erie. Penn Central was dismissed from these actions because the claims were based on pre-petition conduct and were discharged by Penn Central's Consummation Order.

In 1989, a jury found B&LE liable for its participation in the alleged conspiracy, and respondent USX Corporation ("USX"), its former parent, paid approximately $600 million to plaintiffs. Thereafter, USX and B&LE sued Penn Central in the United States District Court for the Western District of Pennsylvania and the Court of Common Pleas of Cuyahoga County, Ohio, for contribution and indemnification in the same amount. Penn Central then petitioned the bankruptcy court to require dismissal of the actions on the ground that the contribution and indemnity claims were based on pre-petition

conduct and were discharged, just as the plaintiffs' underlying claims were discharged, by Penn Central's Consummation Order. The bankruptcy court granted the petition, but the Third Circuit reversed and denied Penn Central's petition for rehearing and suggestion for rehearing en banc. Penn Central now petitions this Court for a writ of certiorari to the Third Circuit.

B. The District Court's Opinion

In granting Penn Central's petition, the District Court nevertheless noted that B&LE "makes a strong argument" that a trilogy of Third Circuit cases "mandate denial." Those cases—*In re Frenville Co.*, 744 F.2d 332 (3d Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985); *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985); and *Paoli Yard (In re Penn Central Transp. Co.)*, 944 F.2d 164 (3d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992)—were decided under Section 205(b) of the Bankruptcy Act, which defines a claim for purposes of a Section 77 railroad reorganization, and its successor Section 101(4), which defines a claim under the Bankruptcy Code. In this trilogy of cases, the Third Circuit recognizes no difference between reorganization under Section 77 of the Act or the Code as to the existence of a claim. A claim does not exist in the Third Circuit under both statutes until it has accrued for statute of limitations purposes under the applicable substantive law on which the claim is based.

For example, in *Frenville* the Third Circuit reasoned that a joint tort-feasor's claim for contribution and indemnity against the debtor arose under New York law, that it "does not accrue at the time of the commission of the underlying act, but rather at the time of the payment of the judgment flowing from the act," 744 F.2d at 337, and since that payment did not occur until post-petition, the claim did not exist within the meaning of Section 101(4) of the Code at the time the bankruptcy petition was filed and was hence not subject to the

automatic stay provisions of Section 362 of the Code. *Id.* Similarly, in *Schweitzer* the Third Circuit held that the tort claims of employees against a bankrupt railroad for asbestos-related personal injury did not accrue under the F.E.L.A. until the injury was manifest, and since that did not occur until after the date of discharge, the claim did not exist within the meaning of Section 205(b) of the Act, was not discharged in the bankruptcy proceeding, and could be asserted against the reorganized company. 758 F.2d at 944.

Although the present case involves claims for indemnity and contribution as in *Frenville*, and arose under Section 77 of the Act as in *Schweitzer*, the District Court refused to follow those cases on a number of grounds, "most importantly," that "there is considerable tension between the *Frenville*, *Schweitzer* and *Paoli Yard* line of cases and firmly established policies and principles underlying the law of bankruptcy." (Pet. App. D at 5d)

C. The Court of Appeals' Opinion

Despite the District Court's reservations, the Third Circuit applied the bankruptcy jurisprudence it had developed in *Frenville*, *Schweitzer* and *Paoli Yard*, reiterating that whether a claim exists turns not on uniform policies of federal bankruptcy law, but rather on accrual of a cause of action under statute of limitations principles. Explicitly following *Frenville*, the Third Circuit "look[ed] to nonbankruptcy law to determine when these claims accrued," 71 F.3d at 1114, and concluded that the Ohio law under which the claims arose in this case was similar to the New York law under which the claims arose in *Frenville*, namely that a cause of action for contribution and indemnification does not accrue for statute of limitation purposes until a joint tort-feasor actually pays a disproportionately large judgment or settlement to the plaintiffs. Reasoning that "[t]hat conclusion frames the issue," *id.* at 1115, the Third Circuit held that since the claims here had not accrued under Ohio law at the time of Penn Central's

Consummation Order, they did not exist, were not barred and could be asserted against the reorganized company. *Id.* at 1115-18.

In response to Penn Central's argument that this analysis has been explicitly rejected by other Courts of Appeals, and that *Frenville* has been severely criticized by many courts,[3] the panel opinion cited the Third Circuit's rule that prior panel decisions can be overruled only en banc:

> In response to Penn Central's argument that *Frenville* was wrongly decided and has not been well received by courts outside the Third Circuit, we direct its attention to Third Circuit Internal Operating Procedure 9.1.

Id. at 1117 n. 5. Finally, recognizing that this case was governed by Section 77 of the Bankruptcy Act, whereas *Frenville* arose under the Bankruptcy Code, the panel noted that this "is a distinction without a difference" because the definition of claim under the two statutes is not materially different and Third Circuit jurisprudence of looking to state statute of limitations law, rather than uniform federal bankruptcy policy, to determine whether a claim exists applies equally under both statutes. *Id.* at 1117.

REASONS FOR GRANTING THE WRIT

At what time a claim exists not only raises the same issue under Section 205(b) of the Bankruptcy Act and Section 101(5) of the Bankruptcy Code,[4] but it is also a central and

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[3] The *Frenville* analysis adopted by the Third Circuit in this case has been aptly described as "one of the most criticized and least followed precedents decided under the Bankruptcy Code." *In re Firearms Import and Export Corp.*, 131 B.R. 1009, 1015 (Bankr. S.D. Fla. 1991).

[4] In addition to the Third Circuit reaching this conclusion in this case, *see* 71 F.3d at 1117, the Seventh Circuit has also observed the identical nature of these two provisions, *see In re Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 974 F.2d 775, 781 (7th Cir. 1992).

critically important issue in virtually every complex bankruptcy reorganization. When a claim exists controls such important determinations as whether the bankruptcy court has jurisdiction over it at all and can thus compromise it equitably in relation to other creditors' claims, *see Epstein v. Official Cmte. of Unsecured Creditors of Estate of Piper Aircraft Corp. (In re Piper Aircraft Corp.)*, 58 F.3d 1573, 1576 (11th Cir. 1995) (citing 11 U.S.C. §§ 101(10), 501, 502), whether attempts to assert it in other courts are prohibited by the automatic stay provisions, *see* 11 U.S.C. § 362, whether it is discharged on confirmation of a plan of reorganization or can be subsequently asserted against the reorganized company, *see* 11 U.S.C. § 1411(d), and whether it should receive a priority classification as an administrative expense, *see* 11 U.S.C. § 503(b).

Federal courts throughout the country constantly grapple with this issue in determining whether a contingent claim which may or may not be known to the potential claimant or may or may not ultimately arise exists so that it can and must be asserted in a reorganization proceeding or be forever barred. They have recognized that a rule requiring contingent claims to be filed at an early stage furthers important bankruptcy policies of allowing the bankruptcy court to resolve it equitably in relation to other creditors' claims and discharge it so as to give the reorganized company finality and a fresh start which, in turn, encourages creditors and new investors to take equity positions in the reorganized company thereby greatly enhancing the chances for a successful reorganization. On the other hand, the courts have also recognized that it would be unfair to require potential claimants who have no way of knowing that they may have a future claim to assert it in a pending reorganization proceeding or be barred from asserting it subsequently.

The tension between these competing considerations continuously arises in bankruptcy proceedings involving such disparate contingent claims as environmental clean-up costs,

mass torts which manifest injury years after exposure, negligence claims where injury occurs post-petition, and indemnity and contribution claims. *See, e.g., Grady v. A.H. Robins Co.*, 839 F.2d 198 (4th Cir.), *cert. dismissed*, 487 U.S. 1260 (1988) (woman injured by debtor's interuterine device held to have pre-petition claim despite fact that injury manifested post-petition); *In re Jensen*, 995 F.2d 925 (9th Cir. 1993) (cause of action under CERCLA held to be pre-petition claim where conduct occurred pre-petition and claimant had notice before bar date); *In re Piper Aircraft Corp.*, 58 F.3d 1573 (11th Cir. 1995) (class of potential future tort victims who might have causes of action against debtor for negligent design and manufacture of aircraft did not have pre-petition claim because they had no pre-petition relationship with debtor); *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991) (EPA cause of action for response costs under CERCLA was pre-petition claim where EPA had pre-petition relationship with debtor and damage resulted from pre-petition conduct); *In re Edge*, 60 B.R. 690 (Bankr. M.D. Tenn. 1986) (cause of action for negligence was pre-petition claim where acts constituting negligence occurred pre-petition even though injury manifested post-petition); *In re Johns-Manville, Corp.*, 57 B.R. 680 (Bankr. S.D.N.Y. 1986) (asbestos victims had pre-petition claims where debtor's conduct giving rise to products liability cause of action occurred pre-petition even though injuries manifested post-petition).

Obviously, uniformity throughout the country in the administration of the federal bankruptcy laws is of the utmost importance. Indeed, Congress' decision to pre-empt the area of bankruptcy law is a manifestation of this policy. Thus this Court has recognized that granting a petition for certiorari is warranted to resolve a "matter . . . of considerable practical importance in the administration of the Bankruptcy Act." *See New York v. Sager*, 336 U.S. 328, 329 (1949). However, the lower federal courts have badly split on the issue of when a claim arises in complex reorganization proceedings. These

courts need guidance now to determine where the line should be drawn between the reorganization advantages of holding that a claim exists and the unfairness which would arise from discharging contingent claims that the claimants did not realize they might have and therefore did not assert in the reorganization proceeding. Because this issue arises frequently, and because it is of such critical importance in many complex reorganizations, it is particularly important that this Court resolve the conflict among circuits and define a uniform national bankruptcy policy.

I. THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH DECISIONS OF THE FOURTH, SEVENTH AND NINTH CIRCUITS ON THE SAME MATTER.

The Fourth Circuit Is In Conflict With The Third Circuit

In *Grady v. A.H. Robins Co.*, 839 F.2d 198 (4th Cir. 1988), Robins manufactured the Dalkon Shield, an interuterine contraceptive device. After Robins filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code, and while the Robins reorganization proceeding was pending, Rebecca Grady sought to sue Robins in another court for injuries which became apparent post-petition, which were allegedly attributable to her pre-petition use of the Dalkon Shield. The issue before the Fourth Circuit was whether Mrs. Grady's cause of action was an existing claim at the time Robins filed its petition and thus was subject to the automatic stay provision of § 362(a)(1) of the Bankruptcy Code.

The Fourth Circuit explained in its opinion that "Mrs. Grady primarily relies upon *Matter of M. Frenville Co., supra*, to support her contention that her claim falls outside the jurisdiction of the automatic stay." 839 F.2d at 200. Her argument was that even though she used the Dalkon Shield prior to Robins' bankruptcy filing, her injury was not manifest until afterward; under governing California law her cause

of action did not accrue until that manifestation; and the Fourth Circuit should follow the Third Circuit and hold that the claim did not exist for bankruptcy law purposes until her cause of action accrued under the applicable state statute of limitations law. Since Mrs. Grady's claim did not accrue under California law until after the bankruptcy filing, she argued that she did not have a pre-petition claim which was subject to the automatic stay.

The Fourth Circuit explicitly refused to follow the Third Circuit's "limiting definition of claim" in *Frenville* ("with respect, we decline to follow it" 839 F.2d at 202), explaining: "We have found no Court outside the Third Circuit which has followed the reasoning and holding of *Frenville.*" 839 F.2d at 201. Instead, the Fourth Circuit held that Mrs. Grady had an existing, although contingent, claim prior to Robins' petition even though her cause of action may not have accrued under California law at that time, because the broad definition of claim and the policies underlying bankruptcy law dictate that a person such as Mrs. Grady who knew that she had used a Dalkon Shield and might manifest injury in the future had an existing claim for bankruptcy law purposes. *Id.* at 202-03. The Fourth Circuit reasoned that the essential nature of a "contingent" claim is that (like the claim of Mrs. Grady or B&LE in our case) it may or may not accrue depending on future events, and the Third Circuit's rationale effectively removes that category of claims from bankruptcy law. *Id.*

Seven years after *Grady,* the Fourth Circuit reiterated its explicit rejection of the Third Circuit's *Frenville* rationale and adhered to its conclusion that federal bankruptcy policy, and not state statute of limitations law, determines when a claim exists under the Bankruptcy Code. In *Butler v. NationsBank, N.A.*, 58 F.3d 1022 (4th Cir. 1995), James Harper forged an endorsement on a check and deposited it in NationsBank on July 24, 1989. He filed a bankruptcy petition in December 1989. NationsBank was not informed that the endorsement was a forgery until February 27, 1990.

The issue before the Fourth Circuit was whether a claim existed under the Code at the time the check was deposited, which would have extinguished the claim in Harper's bankruptcy because that occurred before he filed his petition, or whether it did not exist until NationsBank was notified of the forgery, which would not have extinguished the claim because that occurred after he filed his petition. The Fourth Circuit held that the claim existed at the time of the deposit even though, under governing North Carolina law, the bank's cause of action did not accrue until it learned of the forgery. 58 F.3d at 1029. Explicitly rejecting the "reasoning of *Frenville*," the Court held that "to determine when a claim arises for bankruptcy purposes, reference is to be made to federal bankruptcy law rather than to state law." *Id.*

The Seventh Circuit Is In Conflict With The Third Circuit

In *In re Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 974 F.2d 775 (7th Cir. 1992), the State of Washington sought environmental clean-up costs from the successor company to a reorganized railroad from which it had purchased property. As in the present case, the railroad petitioned for reorganization pursuant to Section 77 of the Bankruptcy Act, and the reorganization court established a final bar date for asserting claims of December 26, 1985. Soil samples taken in June or July of 1985 indicated contamination as the result of a derailment of one of the railroad's train cars. Washington filed a complaint against the reorganized company in 1989 for recovery of clean-up costs and damages under CERCLA resulting from the contaminated property.

The issue before the Seventh Circuit was whether Washington's causes of action under CERCLA were existing contingent claims in December 1985 and hence discharged by the railroad's bankruptcy consummation order. The court held that they were discharged because, at the bar date, such potential causes of action were contingent claims within the meaning of Section 205(b) of the Bankruptcy Act. The Seventh

Circuit rejected Washington's argument that it did not have a contingent claim in December, 1985 because no cause of action accrued under CERCLA until it actually incurred response costs much later. In direct conflict with the Third Circuit's holding in this case, the Seventh Circuit held: "the fact that response costs are necessary for an actual claim to accrue under CERCLA does not necessarily mean that such costs are necessary for a contingent CERCLA claim to accrue under Section 77." 974 F.2d at 785. The Seventh Circuit applied bankruptcy law and policy, not statute of limitations principles, and held a claim exists and must be asserted in a pending reorganization proceeding at least as of the time when the claimant knows there has been a release of a hazardous substance which may lead to CERCLA response costs. *Id.*

Since the Third Circuit's holding below would require a decision that Washington's potential future claim did not exist under Section 205(b) of the Bankruptcy Act prior to the bar date because it had not accrued for statute of limitations purposes under CERCLA, it is squarely in conflict with the Seventh Circuit.

The Ninth Circuit Is In Conflict With The Third Circuit

In *In re Jensen*, 995 F.2d 925 (9th Cir. 1993), the State of California sought clean-up costs under CERCLA from Mr. and Mrs. Jensen for environmental damage caused by leakage from a tank located on their property. On January 25, 1984, a California inspector visited the site and noticed a cinder block tank containing lumber fungicide and expressed his concerns that leakage from the tank could cause environmental damage. On February 13, 1984, Mr. and Mrs. Jensen filed a personal bankruptcy petition under Chapter 7 of the Code. California subsequently incurred costs in cleaning up the site, and asserted a claim against the Jensens as responsible parties in 1987.

The issue before the Ninth Circuit was whether California's CERCLA cause of action was a pre-petition claim discharged in the Jensens' bankruptcy. Recognizing that California's cause of action did not accrue under CERCLA for statute of limitations purposes until it incurred response costs subsequent to the Jensens' bankruptcy proceeding, the Ninth Circuit nevertheless held that California had an existing contingent claim for these future response costs prior to the time the Jensens filed their petition which was thus discharged because California did not assert it. Rejecting the Third Circuit's rationale "because it would appear to excise 'contingent' and 'unmatured' claims from § 101(5)(A)'s list'," 995 F.2d at 930, the Ninth Circuit held that "the State had sufficient knowledge of the Jensens' potential liability to give rise to a contingent claim for cleanup costs before the Jensens filed their personal bankruptcy petition." 995 F.2d at 931.

Thus, the Ninth Circuit looked to federal bankruptcy law and policy to hold that a claim exists and must be asserted in a bankruptcy proceeding when a potential claimant has sufficient knowledge to know that it may mature in the future regardless of whether a cause of action has accrued under the pertinent statute of limitations law—a holding directly in conflict with the Third Circuit's holding in the present case.

This Case Would Have Been Decided Differently In The Other Circuits

It is hardly disputable that the present case would have been decided differently in the Fourth, Seventh and Ninth Circuits. In those courts, the fact that B&LE's cause of action for indemnity and contribution had not accrued under Ohio's statute of limitations law at the time of the Penn Central bar date would have been irrelevant, although it was dispositive in the Third Circuit. These circuits would have explicitly rejected what the Third Circuit relied on—the state law accrual date which begins the statute of limitations running.

They would have held that B&LE's claims did exist as contingent claims and were discharged in the Penn Central bankruptcy because they were based on pre-petition conduct and B&LE and the debtor had a relationship as co-conspirators which put B&LE on notice that it might have indemnity and contribution claims in the future if victims of its antitrust conspiracy sued. B&LE was at least as aware of its potential claim for contribution and indemnification as of the Penn Central bar date as was Mrs. Grady of her negligence claim and the States of Washington and California of their CERCLA claims at the pertinent times in those cases.

II. THE COURTS THAT EMPLOY UNIFORM FEDERAL BANKRUPTCY LAW TO DETERMINE WHETHER A CLAIM EXISTS DIVERGE IN THEIR APPROACHES TO THIS IMPORTANT ISSUE.

As explained *supra*, the Federal courts are regularly called upon to determine, in many different contexts, whether a potential future claim which has not accrued under the governing statute of limitations is nevertheless an existing contingent claim under the Bankruptcy Act or Code. The results of this determination are critical to potential claimants and to the disposition and chance of success of the reorganization proceeding. In the absence of guidance from this Court, the lower federal courts have developed materially divergent approaches to this complex and difficult issue. Therefore, this Court should settle the issue by adopting a rationale to be applied throughout the United States, since that would substantially contribute to certainty and uniformity in the administration of the federal bankruptcy laws.

Some courts primarily emphasize when the conduct on which a future cause of action is based actually occurred. Applying what is referred to in the cases as the "conduct test," these courts hold that a contingent claim exists when the debtor's acts giving rise to the ultimate cause of action occurred. Thus, if the acts occurred pre-petition they consti-

tute existing contingent claims in the bankruptcy proceeding even though the potential claimant was not in fact impacted, and may not even have been aware that he had a potential claim, during the bankruptcy proceeding. As articulated in *In re Johns-Manville Corp.*, 57 B.R. 680 (Bankr. S.D.N.Y. 1986), holding that potential claimants exposed to asbestos prior to the Manville bankruptcy had contingent claims even though no injury was manifest, "the focus should be on the time when the acts giving rise to the alleged liability were performed." *Id.* at 690. *See also Grady v. A.H. Robins Co., supra.*

Other courts have concluded that the time that the conduct occurred is not an appropriate criteria for determining whether a claim exists, essentially because it is unfair to potential claimants who could not be expected to realize that they may have a claim in the future and assert it in the bankruptcy proceeding. These courts emphasize that there must be a pre-petition relationship between the potential claimant and the debtor which would put the claimant on notice he might have a claim in order for a contingent claim to exist. Referred to as the "pre-petition relationship test," this rationale requires that the potential claimant have had a relationship with the debtor prior to the bankruptcy proceeding in order to have an existing contingent claim at the time of the petition. As described by the Eleventh Circuit in *Piper*:

> The prepetition relationship test, as adopted by the bankruptcy court and district court, requires "some prepetition relationship, such as contact, exposure, impact, or privity, between the debtor's prepetition conduct and the claimant" in order for the claimant to hold a § 101(5) claim.

58 F.3d at 1577 (citations omitted). Emphasizing this requirement, the Eleventh Circuit held in *Piper* that a class of persons who might be claimants because as a statistical matter some of

them would be injured in the future by the pre-petition negligent design or manufacture of aircraft by Piper did not have contingent claims since they had no prepetition relationship with Piper. *Id.* at 1577-78.

Still other courts have focused on whether a potential claimant had a reasonable basis to expect that he may have a claim in the future in determining whether that claim exists so that it must be asserted in a bankruptcy proceeding. Referred to as the "fair contemplation test," this holds that future causes of action based on prepetition conduct are existing contingent claims only if they "can be fairly contemplated by the parties at the time of [d]ebtor's bankruptcy." *In re Jensen,* 995 F.2d at 930 (quoting *In re National Gypsum Co.,* 139 B.R. 397, 409 (N.D. Tex. 1992)). Applying this approach, the Seventh circuit in *Chicago, Milwaukee, St. Paul and Pacific R.R. Co.* and the Ninth Circuit in *Jensen* held that CERCLA response costs were existing contingent claims during reorganization proceedings because the potential claimants knew that the property in question had been contaminated and thus should have reasonably contemplated that their CERCLA claim might accrue in the future. *See* 974 F.2d at 786; 995 F.2d at 931.

Finally, after reviewing these various tests, the Eleventh Circuit recently adopted what it called the "Piper test" which appears to be a hybrid of some of the others. See *Epstein v. Official Cmte. of Unsecured Creditors of Estate of Piper Aircraft Corp. (In re Piper Aircraft Corp.),* 58 F.3d 1573, 1577 (11th Cir. 1995).

Under these various tests, the same facts will obviously result in materially different determinations as to whether a claim exists. Particularly in the increasingly numerous reorganization proceedings where potential future claims are large or numerous, that determination will have a profound effect on the course and potential success of the reorganization proceeding. *See In re Chateaugay,* 944 F.2d at 1005 ("one may

well speculate whether, if unincurred CERCLA response costs are not claims, some corporations facing substantial environmental claims will be able to reorganize at all").

In sum, the lower federal courts have clearly adopted "divergent approaches" necessitating a writ of certiorari to allow this Court to articulate a single, uniform national standard. *See Chicago Teachers Union v. Hudson*, 475 U.S. 292, 300 (1986) ("The importance of the case, and the divergent approaches of other courts to the issue, led us to grant certiorari."); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 725 n.16 (1979) (Court granted writ of certiorari where "[o]ther Courts of Appeals have adopted divergent approaches").

III. THIS CASE PRESENTS AN OPPORTUNITY FOR THE COURT TO RESOLVE A CONFLICT AMONG CIRCUITS AND CLARIFY AN IMPORTANT ISSUE OF FEDERAL BANKRUPTCY LAW.

As this petition demonstrates, the lower federal courts are in conflict, confusion and disarray over the rationale to be applied in determining whether a claim exists at any particular time under federal bankruptcy law, and this is an issue of real importance in the successful administration of reorganization proceedings and in maintaining national uniformity.

The fact that the Third Circuit decision below resolved this issue under Section 77 of the Bankruptcy Act which was repealed in 1978 does not make this case an unsuitable vehicle for this Court to bring badly needed clarity and uniformity to the lower federal courts, because the meaning of claim in that section is essentially the same as in the Bankruptcy Code which superseded it and is in effect today.[5] Thus adjudication

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[5] Whereas the Bankruptcy Code contains a single definition of claim, in Section 101(5), which applies throughout the statute, the Bankruptcy Act contained different definitions of claim in different sections governing different types of bankruptcy proceedings. The meaning

of this case will govern the interpretation of claim under both Section 77 of the Bankruptcy Act and the Bankruptcy Code and will control resolution of this issue in the multitude of reorganization proceedings where it will arise in the future.

The Third Circuit has made crystal clear that it applies the standard of looking to state statute of limitations law to determine when a claim exists equally under Section 77 of the Act and the Code, and that it would have decided this case precisely the same whether it arose under the Act or the Code. Indeed, the panel opinion below relied on both Act and Code cases and explicitly concluded that whether this issue is resolved under the Act or Code is a "distinction without a difference." 71 F.3d at 1117. Focusing on the minor differences in language between Section 205(b) of the Act and Section 101(4) of the Code, the panel concluded:

> In neither brief nor argument could counsel for Penn Central explain how these two definitions differ and why that difference should lead us to a different result here than in *Frenville*.

Id.

Similarly, other federal courts dealing with this issue, including the courts of appeals that are in direct conflict with the Third Circuit, have cited precedents under the Act and the Code interchangeably. None of these cases has suggested a different analysis or a different result depending on whether Section 77 or the Code definitions of claim are applicable. To the contrary, the Seventh Circuit decision squarely in con-

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of claim under Section 77, governing railroad reorganizations, and Chapter 10, governing reorganization of publicly held companies, is essentially the same as in the Bankruptcy Code. But other chapters of the Act, primarily governing individual and non-public bankruptcy proceedings, contained a more restrictive definition of claim, requiring "provability" in order for a claim to exist. Those sections are not involved in this case. Thus, while some definitions of claim in the Act were different than the one that is applicable throughout the Code, the definition of claim under Section 77, contained in Section 205(b), is essentially the same as the one in Section 101(5) of the Code.

flict with the Third Circuit—*In re Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*—arose under Section 77 of the Act, just as the decision below did, yet relied on Code precedents. The Seventh Circuit explained:

> Just as Section 77 of the 1898 Act broadly defines claims, the new Bankruptcy Code also broadly defines claims. *Compare* 11 U.S.C. § 205(b) (repealed 1978) and 11 U.S.C. § 101(4)(A) and (B) (enacted 1978).

974 F.2d at 781. Since the issue of when a claim exists is the same under Section 77 of the Act and the Code, as has been universally recognized by the numerous lower federal court cases dealing with this issue, a decision by this Court in this case will fully apply to cases arising under both statutes and will control literally thousands of reorganization proceedings in which this issue will inevitably arise in the future.

CONCLUSION

For the foregoing reasons, we respectfully request that a writ of certiorari be granted.

Dated: March 25, 1996
New York, New York

Respectfully submitted,

Peter M. Fishbein
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER, LLP
425 Park Avenue
New York, New York 10022
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Counsel of Record for Petitioner

APPENDIX A

RULE 29.1 STATEMENT

AMERICAN PREMIER UNDERWRITERS, INC.

Insurance and related subsidiaries

AMERICAN FINANCIAL GROUP, INC.
- **American Premier Underwriters, Inc.**
  - Pennsylvania Company
    - Atlanta Casualty Company
      - American Premier Insurance Company
      - Atlanta Speciality Insurance Company
      - Mr. Agency of Georgia, Inc.
        - Atlanta Casualty General Agency, Inc.
        - Atlanta Insurance Brokers, Inc.
        - Treaty House, Ltd. (d/b/a Mr. Budget)
    - Infinity Insurance Company
      - Infinity Agency of Texas, Inc.
      - The Infinity Group, Inc.
      - Infinity Select Insurance Company
      - Infinity Southern Insurance Corporation
      - Leader National Insurance Company
        - Budget Insurance Premiums, Inc.
        - Leader National Agency, Inc.
        - Leader National Agency of Texas, Inc.
        - Leader National Insurance Agency of Arizona
        - Leader Preferred Insurance Company
        - Leader Speciality Insurance Company

AMERICAN PREMIER UNDERWRITERS, INC.

Insurance and related subsidiaries

- AMERICAN FINANCIAL GROUP, INC.
  - **American Premier Underwriters, Inc.**
    - Pennsylvania Company
      - Republic Indemnity Company of America
        - Republic Indemnity Company of California
      - Windsor Insurance Company
        - American Deposit Insurance Company
          - Granite Finance Co., Inc.
        - Coventry Insurance Company
        - El Aguila Compañia de Seguros, S.A. de C.V.
        - Moore Group Inc.
          - Casualty Underwriters, Inc.
          - Dudley L. Moore Insurance, Inc.
          - Hallmark General Insurance Agency, Inc.
          - Middle Tennessee Underwriters, Inc.
            - Insurance Finance Company
          - Windsor Group, Inc.
        - Regal Insurance Company
        - Texas Windsor Group, Inc.

AMERICAN PREMIER UNDERWRITERS, INC.

Non-Insurance subsidiaries

AMERICAN FINANCIAL GROUP, INC.

- **American Premier Underwriters, Inc.**
  - Pennsylvania Company
    - Insurance and related subsidiaries (*supra*)
    - PCC Hotel, Inc.
    - PCC-N26LB, Inc.
      - ESC, Inc.
      - Marathon Manufacturing Companies, Inc.
  - PCC Real Estate, Inc.
    - PCC Billboard Realty Corp.
    - PCC Chicago Realty Corp.
    - PCC Fordham Realty Corp.
    - PCC Gun Hill Realty Corp.
    - PCC Irvington Realty Corp.
    - PCC Michigan Realty Corp.
    - PCC Scarsdale Realty Corp.
    - PCC Tuckahoe Realty Corp.
  - Penn Central Energy Management Company

AMERICAN PREMIER UNDERWRITERS, INC.

Non-Insurance subsidiaries

AMERICAN FINANCIAL GROUP, INC.

- **American Premier Underwriters, Inc.**
  - The Ann Arbor Railroad Company
  - The Associates of the Jersey Company
  - Delbay Corporation
  - Detroit Manufacturers Railroad Company
  - The Indianapolis Union Railway Company
  - Lehigh Valley Railroad Company
  - The Michigan Central Railroad Company
  - The New York And Harlem Railroad Company
  - The Owasco River Railway, Inc.
  - Penn Central Properties, Inc.
  - Pennsylvania-Reading Seashore Lines
  - Penn Towers, Inc.
  - Pittsburgh and Cross Creek Railroad Company
  - Terminal Realty Penn Co.
  - Union Railroad Corp.
  - Waynesburg Southern Railroad Company

APPENDIX B

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

In the Matter of
PENN CENTRAL TRANSPORTATION COMPANY

USX Corporation and Bessemer
and Lake Erie Railroad Company,
Appellants.

No. 94-2154
Argued July 24, 1995
Decided Dec. 12, 1995

Timothy W. Bergin, Squire, Sanders & Dempsey, Washington, DC, Thomas S. Kilbane, Squire, Sanders & Dempsey, Cleveland, OH, William J. Taylor, Taylor & Taylor, Philadelphia, PA, David A. Lynch, Senior General Attorney, USX Corporation, Pittsburgh, PA, for Appellants.

Matthew J. Siembieda, (argued), Carl M. Buchholz, Blank, Rome, Comisky & McCauley, Philadelphia, PA, Kenneth N. Hart, James J. Capra, Donovan, Leisure, Newton & Irvine, New York City, Arlin M. Adams, Schnader, Harrison, Segal & Lewis, Philadelphia, PA, Robert W. Olson, Michael L. Cioffi, American Premier Underwriters, Inc., Cincinnati, OH, for Appellee.

Before:

BECKER, NYGAARD and ALITO,
Circuit Judges

OPINION OF THE COURT

NYGAARD, Circuit Judge.

Appellants, USX Corporation and the Bessemer and Lake Erie Railroad Company, sued the reorganized Penn Central Transportation Company (now known as American Premier Underwriters, Inc.) for contribution and indemnity based on Penn Central's participation with them in an antitrust conspiracy. Although appellants were held liable for nearly $600 million in damages from that conspiracy, *see In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144 (3d Cir. 1993), the courts ruled that the direct claims against Penn Central were barred by its reorganization.

In response to the underlying lawsuit for contribution and indemnity, Penn Central filed a petition in its bankruptcy case to require the dismissal of the suit, alleging that the 1978 Consummation Order and Final Decree barred it. The district court granted the petition. *In re Penn Central Transp. Co.*, No. 70-347 (E.D. Pa. Oct. 13, 1994). We will reverse.

1.

The Penn Central bankruptcy proceeding is more than a quarter-century old; the facts of the antitrust conspiracy are even older. Andrew Carnegie built the Bessemer to link his Pittsburgh-area steel mills to raw materials sources, specifically iron ore, received from ore ships at Lake Erie ports. The railroad was a wholly-owned subsidiary of United States Steel Corporation (now USX Corporation) until 1989, when it was spun off. USX, however, retained liability for the antitrust

claims at issue under its indemnity agreement with the Bessemer.

Beginning in 1956, the Bessemer and several other railroads, including the Penn Central's predecessors, entered into a joint ratemaking agreement, which was given limited immunity from antitrust attack under § 5a of the Reed-Bulwinkle Act, ch. 491, 62 Stat. 472 (1948). In 1970, the Penn Central filed a bankruptcy petition under § 77 of the Bankruptcy Act of 1898. This action, and the bankruptcies of several other regional railroads, motivated Congress to pass the Regional Rail Reorganization Act of 1973, under which the Penn Central conveyed its rail assets to Conrail in 1976. In 1978, the district court entered its Final Decree and Consummation Order; which included a limitation or bar date for all claims against the debtor. The Consummation Order transferred the reorganized Penn Central's railroad property and discharged it from any further claims predicated upon its pre-consummation acts or conduct. The district court retained jurisdiction over any claims that might later be asserted against Penn Central.

In 1980, Pinney Dock and Litton filed antitrust complaints against the Bessemer, Penn Central and other railroads. The claims against Penn Central were held barred by the discharge. *In re Penn Central Transp. Co. ("Pinney Dock")*, 42 B.R. 657, 676 (E.D. Pa. 1984), *aff'd*, 771 F.2d 762 (3d Cir.), *cert. denied*, 474 U.S. 1033, 106 S. Ct. 596, 88 L. Ed. 2d 576 (1985). Between 1982 and 1984, several plaintiffs filed suits under federal and Ohio antitrust law against the signatories to the § 5a agreement, including Penn Central and the Bessemer. These claims were consolidated as the "MDL 587" litigation. The district court dismissed Penn Central as a defendant, concluding that because the claims arose pre-consummation they were discharged. All remaining defendants except the Bessemer settled with plaintiffs. The Bessemer went to trial and lost. Judgment was entered against it in excess of $592 million, and paid by USX. The Bessemer and USX then filed complaints in federal and Ohio courts seeking indemnity and

contribution from Penn Central, as the instigator, enforcer and primary beneficiary of the conspiracy.

2.

The predicate conduct of appellants' antitrust liability began before Penn Central filed its bankruptcy petition. Thus, Penn Central asserts that appellants' claims against it have been discharged by the Consummation Order and Final Decree. Appellants argue, however, that their claims seeking contribution and indemnity could not possibly have been filed before the 1978 bar date, because *they* were not sued until later, and hence should be treated as post-consummation claims, i.e., neither discharged nor barred.

i.

We look to nonbankruptcy law to determine when these claims accrued. *See Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 941 (3d Cir.), *cert, denied*, 474 U.S. 864, 106 S. Ct. 183, 88 L. Ed. 2d 152 (1985); *In re M. Frenville Co.*, 744 F.2d 332, 335 (3d Cir. 1984), *cert. denied*, 469 U.S. 1160, 105 S. Ct. 911, 83 L. Ed. 2d 925 (1985). We agree with appellants that their claims for contribution and indemnity could not accrue until the MDL 587 complaints were filed against them between 1982 and 1984. In *Frenville*, applying New York law, we opined that:

> For both separate actions and third-party complaints, a claim for contribution or indemnification does not accrue at the time of the commission of the underlying act, but rather at the time of the payment of the judgment flowing from the act.

744 F.2d at 337. The MDL 587 claims arose under federal and Ohio law. That law, for our purposes at least, is consistent with the law applied in *Frenville*. For example, the Ohio Supreme Court has stated that

> the right to contribution is inchoate from the time of the creation of the relationship giving rise to the common burden until the payment by a co-obligor of more than his proportional share, and . . . the right becomes complete and enforceable only upon a payment by the claimant extinguishing the whole of the common obligation.

National Mut. Ins. Co. v. Whitmer, 70 Ohio St. 2d 149, 24 O.O.3d 248, 435 N.E.2d 1121, 1123 (1982); *see Ross v. Spiegel, Inc.*, 53 Ohio App. 2d 297, 7 O.O 3d 385, 373 N.E.2d 1288, 1295 (1977) (similar rule for indemnity). Applying federal admiralty law, we reached a similar conclusion. *See Sea-Land Serv., Inc. v. United States*, 874 F.2d 169, 171 (3d Cir. 1989).

ii.

That conclusion frames the issue that was before the district court and is now before us: whether a claim that arose after the 1978 Consummation Order was nevertheless discharged by that order. We have already answered that question in the negative, at least in the context of the § 77 reorganization presented by this case.[1]

In *Schweitzer*,[2] plaintiffs were exposed to asbestos during their employment with the Reading Railroad and the Central

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[1] Indeed, our holding today was foreshadowed two decades ago in the § 77 case of *In re Reading Co.*, 404 F. Supp. 1249 (E.D. Pa. 1975), which involved similar facts. There, the court held that claims for contribution and indemnity asserted against a bankrupt railroad were not prepetition in nature—even though the facts giving rise to primary liability occurred before the railroad declared bankruptcy—because the railroad settled with the plaintiff post-bankruptcy and only then did the cause of action for contribution and indemnity accrue. *Id.* at 1251.

[2] *See also In re Central R.R. Co.*, 950 F.2d 887, 892 (3d Cir. 1991) (following *Schweitzer*), *cert. denied*, 503 U.S. 971, 112 S. Ct. 1586, 118 L. Ed. 2d 305 (1992); *Zulkowski v. Consolidated Rail Corp.*, 852 F.2d 73, 74 (3d Cir.) (same), *cert. denied*, 488 U.S. 994, 109 S. Ct. 559, 102 L. Ed. 2d 585 (1988).

Railroad of New Jersey. Later, but before plaintiffs' injuries manifested themselves, these railroads consummated a reorganization under § 77. When plaintiffs discovered their injuries, they filed FELA actions against Conrail, which had succeeded to the former railroads' rail assets.

Conrail argued that the consummation order discharged any claims asserted by the injured workers, but we disagreed, noting first "that plaintiffs' rights only could have been affected by the discharge of all 'claims' against their employer if they had 'claims' within the meaning of section 77 prior to the consummation date of their employer's reorganization." *Id.* at 941. We concluded "that if plaintiffs had causes of action that existed under FELA prior to the relevant consummation dates they had 'claims.' " *Id.* We then analyzed plaintiffs' claims under FELA and concluded that no cause of action accrued until the manifestation of plaintiffs' injuries. *Id.* at 942.

This case is analogous to *Schweitzer*. Like the subclinical injuries there, appellants here had no cause of action against Penn Central pre-consummation. Because they could not have filed this action during the Penn Central bankruptcy, *Schweitzer's* lesson is that their claims could not have been discharged.

Penn Central argues that appellants had preconsummation, contingent, dischargeable claims. It relies on our discussion in *Schweitzer* of the early § 77B case of *In re Radio-Keith-Orpheum Corp.* (*"RKO"*), 106 F.2d 22 (2d Cir.), *cert. denied*, 308 U.S. 622, 60 S. Ct. 377, 84 L. Ed. 519 (1939). We find that case to be inapposite.

In *RKO*, landlords leased property to a corporation's subsidiary, on condition that the parent corporation guarantee rent payments. When the parent went bankrupt, the subsidiary was still paying rent. The landlords did not file a claim against the bankrupt's estate. But after the debtor's reorganization when the subsidiary defaulted, they asserted that their claim on the guarantee was not discharged. The Court of Appeals disagreed:

> The appellants . . . were not as [a] matter of law entitled to stand aloof and obtain a continuance of the guaranties unaffected by reorganization, the equivalent of a preference for them over unsecured creditors with accrued or determinable claims. What they were entitled to was treatment as nearly like that accorded to ordinary unsecured creditors as the circumstances permitted[.]

Id. at 26-27.

Penn Central maintains that appellants here stand in the same position as the landlords in *RKO. Schweitzer*, however, counsels otherwise:

> The reasoning in *Radio-Keith-Orpheum* is not controlling here, however, because we do not believe plaintiffs had "interests" of any character before injury manifested itself. In our view, before one can have an "interest" which is cognizable as a contingent claim under section 77, one must have a legal relationship relevant to the purported interest from which that interest may flow.
>
> In *Radio-Keith-Orpheum*, although there had been no breach of the lease agreement and thus there was no present cause of action pursuant to the guaranties, there was a guarantor-guarantee legal relationship from which an interest in the guaranty could flow.[3] There is no legal relationship, however, between a tortfeasor and a tort victim until a tort actually has occurred. . . .

758 F.2d at 943 (citation omitted).

Undaunted, Penn Central asserts that the § 5a agreement to which the Bessemer was a party takes this case out of the

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[3] *Accord Frenville*, 744 F.2d at 336 ("The present case is different from one involving an indemnity or surety contract. When parties agree in advance that one party will indemnify the other party in the event of a certain occurrence, there exists a right to payment, albeit contingent. Such a surety relationship is the classic case of a contingent right to payment under the Code—the right to payment exists as of the signing of the agreement, but it is dependent on the occurrence of a future event." (Citations omitted.)).

ambit of *Schweitzer* and places it squarely within the holding of *RKO*. We cannot agree. The key to *Schweitzer's* treatment of *RKO* was that the *RKO* landlords had explicitly bargained to look to the unreorganized debtor for their security. Here, however, the § 5a agreement confers no right of indemnification. That agreement, although the source of appellants' primary liability to the MDL 587 plaintiffs, simply does not evidence an intent to look to the pre-reorganized Penn Central for contribution or indemnity claims. Put simply, although there was a legal relationship between the Bessemer and the Penn Central's predecessors, there was no legal relationship from which a prepetition interest in contribution or indemnity could flow. *See id.* at 943.

This conclusion is supported by the § 77 case of *In re Penn Central Transp. Co. ("Paoli Yard")*, 944 F.2d 164 (3d Cir. 1991). Penn Central and its predecessors operated a railroad yard on an electrified portion of its line. The land became contaminated from PCBs common in the electrical transformers of the period. As part of the Penn Central reorganization, the Paoli Yard was conveyed to Conrail, and later to SEPTA. Two years post-consummation, however, Congress imposed retroactive liability on former owners of toxic waste sites. The United States sued both SEPTA and Conrail, and Conrail sought contribution and indemnity from the reorganized Penn Central. *Id.* at 165-66.

The district court construing *Schweitzer* narrowly, held that the Consummation Order barred the claims against the reorganized Penn Central. *Id.* at 166. We reversed, noting first that at the moment of the bankruptcy discharge and the inception of the injunction, CERCLA had not yet been passed by Congress. Indeed CERCLA was not enacted until 1980. Consequently, at the time of the Consummation Order, there was no statutory basis for liability to be asserted against [Penn Central] by the petitioners. Just as the employees in *Schweitzer* had no recognizable tort causes of action under the FELA prior to the employer railroad's relevant consummation dates, the petitioners here could not have brought claims under CERCLA prior to the Consummation Date.

Id. at 167. We then went on to reject the theory that a contingent, dischargeable claim existed pre-consummation:

> Under the facts now before us in this appeal, it was not until the passage of CERCLA that a legal relationship was created between the petitioners and [Penn Central] *relevant to the petitioners' potential causes of action* such that an interest could flow. Because this legal relationship did not evolve until after the Consummation Date, the petitioners did not have contingent claims against [Penn Central]. Accordingly, our decision in *Schweitzer* leads us to the conclusion that the petitioners' asserted claims under CERCLA did not constitute dischargeable claims within the meaning of section 77 and thus survive the discharge of the debtor.

Id. at 167-68 (emphasis added).

In *Paoli Yard*, we made explicit what was implicit in *Schweitzer*: it is not sufficient for dischargeability purposes that there was *some* pre-consummation legal relationship between the debtor and the party seeking now to assert a claim; rather, that relationship must be relevant to the claimant's cause of action. When CERCLA was enacted, two fundamental changes occurred in that relationship: first, Conrail became primarily liable for the toxic waste cleanup. Second, and more importantly for our purposes, CERCLA made Penn Central potentially liable to Conrail for contribution and indemnity. Only then did a legal relationship relevant to the cause of action arise.[4]

Although not necessary to our holding, *Frenville* also supports our conclusion that appellants' claims against the reorganized Penn Central were not discharged. In that case, banks sued an accounting firm for negligently preparing the debtor's

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[4] Likewise, in *Schweitzer*, there was undoubtedly an employer-employee contractual relationship between the railroads and the injured workers. That relationship, by itself, was not sufficiently relevant to their tort claims that the workers somehow agreed to look only to the debtors' estates for compensation.

financial statements. The firm sought relief from the automatic stay to claim contribution and indemnity from the debtor. 744 F.2d at 333-34. We held that, because that firm's claims for contribution and indemnity could not accrue until the banks sued the firm, the firm's claims arose post-petition and were nondischargeable; hence, the automatic stay was inapplicable. *Id.* at 337.

Frenville, of course, arose under the Bankruptcy Code, not § 77 of the 1898 Bankruptcy Act. Key to our analysis in *Frenville* was the definition of "claim" as a "right to payment" in 11 U.S.C. § 101(4), which we held was intended by Congress to be interpreted broadly. *See id.* at 336. Penn central seizes on this distinction and urges us not to apply *Frenville* to this § 77 case. This, however, is a distinction without a difference. Section 77(b) of the 1898 Act defined "claims" as "debts" or "other interests of whatever character." In neither brief nor argument could counsel for Penn Central explain how these two definitions differ and why that difference should lead us to a different result here than in *Frenville*.[5]

Our holding makes for sound policy. Appellants could not have been expected to file a contingent claim pre-consummation based on the speculative possibility that their conduct, which began in the 1950s, might have extended beyond the bounds of its statutory antitrust immunity and that they might successfully be sued years later. If the Bessemer were required to act with such clairvoyance, then countless other entities that did business with the Penn Central and its predecessors would also have been required to file contingent claims. Affixing value to these claims, both individually and in the aggregate, would be impossible, and the uncertainty thus created would render any reorganization plan unworkable. Indeed, we find the *Schweitzer* analysis of when

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[5] In response to Penn Central's argument that *Frenville* was wrongly decided and has not been well received by courts outside the Third Circuit, we direct its attention to Third Circuit Internal Operating Procedure 9.1.

asbestos-caused disease claims accrue both analogous and persuasive:

> If mere exposure to asbestos were sufficient to give rise to a F.E.L.A. cause of action, countless seemingly healthy railroad workers, workers who might never manifest injury, would have tort claims cognizable in federal court. It is obvious that proof of damages in such cases would be highly speculative, likely resulting in windfalls for those who never take ill and insufficient compensation for those who do.

758 F.2d at 942.

iii.

As a final ground for affirmance, Penn Central argues that, as a matter of law, appellants have no valid claims for indemnity or contribution. This argument, however, goes to the merits of appellants' indemnity and contribution claims currently pending in other courts, which will proceed there once our mandate issues. Hence, we do not reach the issue.

3.

Because appellants' claims against Penn Central arose post-consummation and were not discharged, we will reverse and remand the cause for the district court to deny Penn Central's petition.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-2154

IN THE MATTER OF:
PENN CENTRAL TRANSPORTATION COMPANY

USX Corporation and Bessemer and
Lake Erie Railroad Company,
Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
D.C. CIVIL ACTION NO. 70-00347

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE and SAROKIN *Circuit Judges*

The petition for rehearing filed by appellee American Premier Underwriters, Inc. in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for hearing is denied.

By the Court,

Dated: FEB 16, 1996

s/
Circuit Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In Proceedings for the Reorganization of a Railroad

Bkcy. No. 70-347

In the matter of

PENN CENTRAL TRANSPORTATION COMPANY,
Debtor.

MEMORANDUM AND ORDER NO. 4344

Re: Indemnification and Contribution—MDL 587 Judgments

FULLAM, Sr. J. OCTOBER 13, 1994

Beginning in the mid-1950's, a group of railroads—the Bessemer & Lake Erie Railroad Company (B&LE) among them—conspired to monopolize dock handling, storage and land transportation of iron ore along lower Lake Erie. The railroads' actions led to their indictment on criminal antitrust charges[1] and, ultimately, to ten private antitrust actions brought by various steel, trucking and dock companies, which were consolidated in this Court. *See In re Lower Lake Erie Iron Ore Antitrust Litigation*, 759 F. Supp. 219 (E.D. Pa. 1991) ("*MDL 587*"), *aff'd in part*, 998 F.2d 1144 (3d Cir.

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[1] *See United States v. Baltimore & O.R.R.*, 538 F. Supp. 200 (D.D.C. 1982), *aff'd sub nom. United States v. Bessemer & L.E.R.R.*, 717 F.2d 593 (D.C. Cir. 1983).

1993), *cert. denied*, 114 S. Ct. 921 (1994). The claims against the Penn Central and all other defendant railroads except the B&LE were dismissed or settled prior to or during trial.

After a bifurcated jury trial, judgments totalling more than six hundred million dollars were entered against the B&LE. These judgments have now been satisfied, and the B&LE has filed suit in both the United States District Court for the Western District of Pennsylvania and the Court of Common Pleas of Cuyahoga County, Ohio, seeking indemnity and/or contribution from the reorganized successor of its alleged (but unindicted) coconspirator, the Penn Central Corporation (PCC).[2]

PCC has petitioned this Court for an order directing the B&LE and its former owner, USX Corporation (USX), to show cause why they should not be (1) directed to dismiss the actions now pending against PCC, and (2) held in contempt for violating § 7.02 of the Consummation Order.[3] A hearing was held on July 12, 1994.

The B&LE makes a strong argument that a trilogy of Third Circuit cases—*In re M. Frenville Co.*, 744 F.2d 332 (3d Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985), *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985), and *In re Penn Central Transportation Co.*, 944 F.2d 164 (3d Cir. 1991) ("*Paoli Yard*"), *cert. denied*, 112 S. Ct. 1262 (1992)—mandate denial of PCC's petition.

In *Frenville*, an accounting firm was sued in a New York state court by a group of banks for negligently preparing the financial statements of a Chapter 7 bankrupt. The accountants

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[2] PCC, which for clarity's sake is how I will continue to refer to it, is now known as American Premier Underwriters, Inc.

[3] PCC also makes a number of arguments that go to the merits of the actions. As I have stated before, "[t]his court's retention of jurisdiction under §§ 7.02 and 7.04 of the Consummation Order did not include jurisdiction to decide the merits of proposed lawsuits, but only whether the Consummation Order precludes their assertion." *In re Penn Central Transportation Corp.*, Memorandum and Order No. 4331 (E.D. Pa. Aug. 8, 1990), *rev'd on other grounds*, 944 F.2d 164 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1262 (1992).

filed a complaint in Bankruptcy Court, and sought relief from the automatic stay in order to bring the debtors (the company and its principals) into the New York action as third party defendants, so as to obtain indemnification or contribution. The Bankruptcy Judge refused to grant relief from the automatic stay, holding that the debtors' liability, if any, resulted from prepetition acts. The District Court affirmed. A panel of the Third Circuit reversed and held that since under New York law, the accounting firm's claim for indemnity or contribution did not arise until it was sued by the banks, the *claim* was postpetition and the automatic stay was inapplicable—regardless of the fact that the *acts* of the debtors upon which the claim was predicated all occurred prepetition.[4]

Schweitzer, unlike *Frenville*, was decided under § 77 of the Bankruptcy Act, which is the statutory provision applicable here. In *Schweitzer*, former railroad workers of two bankrupt railroads brought suits under the FELA seeking to recover from the reorganized (non-rail) entities for asbestos-related personal injuries. The Consolidated Rail Corporation (or Conrail, to which the bankrupts' rail assets had been transferred on April 1, 1976) was a co-defendant in some actions and an intervenor in others. The Court of Appeals held that asbestos-related injuries did not exist before the injuries manifested themselves (in this case, post-petition), and therefore were not dischargeable claims.

In *Paoli Yard*, a panel of the Third Circuit expanded the holding of *Schweitzer* and held that the United States, the Southeastern Pennsylvania Transportation Authority (SEPTA) and Conrail were entitled to bring claims under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) against PCC for the cleanup of the Paoli Rail Yard. The Court held that the CERCLA claims could not

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[4] I recognize that *Frenville* has been roundly criticized, *see, e.g.* Mabey & Jarvis, *In re Frenville: A Critique by the National Bankruptcy Conference's Committee on Claims and Distributions*, 42 Bus. Law. 697 (1987). This, of course, does not make the case any less binding on this Court.

have been discharged by the Consummation Order because CERCLA (and thus, CERCLA claims) did not then exist, and distinguished its holding in *In re Penn Central Transportation Co.*, 771 F.2d 762 (3d Cir.) ("*Pinney Dock*"), *cert. denied*, 474 U.S. 1033 (1985), on the grounds that "all of the factual and legal elements" of the antitrust claims of the *Pinney Dock* plaintiffs existed prior to the Consummation Date, even though the plaintiffs were unaware of them. In *Paoli Yard*, on the other hand, the cause of action itself did not exist until after the Consummation Date.

Applying *Frenville*, *Schweitzer* and *Paoli Yard* to the present controversy, it is argued, is a simple matter. As the B&LE urges, any cause of action for indemnification and contribution did not exist as a matter of law until 1982-84 at the earliest, when the antitrust plaintiffs filed their complaints. Therefore, the argument goes, the B&LE's claim could not have been discharged by the Consummation Order on October 24, 1978. There are factors present here, however, that militate against a mechanical application of precedent.

First, the B&LE, unlike the *Schweitzer* plaintiffs, is hardly an innocent victim, but a willing member of a criminal conspiracy. In addition to this illegal relationship, the Penn Central and the B&LE had a preexisting legal relationship as signatories to the 1948 "Agreement of Eastern Railroads Under Section 5a of the Interstate Commerce Act." Both were members of the Eastern Railroads' Coal, Coke and Iron Ore Committee (CCIOC), which was established by the § 5a Agreement and served as the forum for the conspiracy. The B&LE, therefore, arguably had an "interest" cognizable as a contingent claim flowing from this relationship. *See Schweitzer*, 758 F.2d at 943.

Second, the claims against PCC of the *MDL 587* plaintiffs themselves were dismissed as barred by the Consummation Order. *See MDL 587*, Pretrial Order No. 12a (E.D. Pa. Mar. 27, 1987) (pre-consummation claims). Moreover, the claims of plaintiffs in a related case, arising from the identical conduct, were held to have been discharged. *See In re Penn*

Central Transportation Co., 42 B.R. 657 (E.D. Pa. 1984) (Memorandum and Order No. 4243), *aff'd*, 771 F.2d 762 (3d Cir.), *cert. denied*, 474 U.S. 1033 (1985). It would be strange indeed to permit a member of an unlawful conspiracy to assert indemnification and contribution claims for damages that were discharged insofar as the innocent victims of that conspiracy were concerned. A conspirator ought to be at least equally subject to the risk of bankruptcy of a potential indemnitor.

Finally—and perhaps most importantly—there is considerable tension between the *Frenville-Schweitzer-Paoli Yard* line of cases and firmly established policies and principles underlying the law of bankruptcy. Accordingly, I am of the view that these cases should be narrowly construed, and absent specific guidance from the Court of Appeals, I decline to do otherwise. The B&LE may not pursue its pending litigation. Its asserted legal position, however, is not so unreasonable as to warrant the imposition of contempt sanctions.

An Order follows:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In Proceedings for the Reorganization of a Railroad

Bkcy. No. 70-347

In the matter of

PENN CENTRAL TRANSPORTATION COMPANY,
Debtor.

ORDER NO. 4344

AND NOW, this 13th day of October, 1994, it is ORDERED:

1. The Bessemer & Lake Erie Railroad (B&LE) and USX Corporation (USX) are restrained and enjoined from asserting or prosecuting, or attempting to assert or prosecute, their claims in *USX Corporation v. The Penn Central Corporation*, No. 94-877 (W.D. Pa.), and *USX Corporation v. The Penn Central Corporation*, No. 94-271191 (C.P. Cuyahoga County, Ohio).

2. The application for contempt sanctions is DENIED.

3. American Premier Underwriters, Inc. (formerly the Penn Central Corporation) is directed to serve copies of this Order by overnight mail service to counsel of record for USX and the B&LE.

/s/
Sr. J.

(2)

No. 95-1547

Supreme Court, U.S.
FILED
APR 25 1996
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

In the Matter of:
Penn Central Transportation Company

AMERICAN PREMIER UNDERWRITERS, INC.,
Petitioner,
v.
USX CORPORATION and BESSEMER and
LAKE ERIE RAILROAD COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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Dated: April 25, 1996

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

3490

QUESTION PRESENTED

Whether the Third Circuit Court of Appeals correctly held, under Section 77 of the repealed Bankruptcy Act of 1898, that claims brought by the Bessemer and Lake Erie Railroad ("B&LE") against the former Penn Central Railroad for contribution and indemnity, which could not have arisen until commencement of the underlying federal and state antitrust suits against B&LE in the 1980s (when B&LE first had notice of its potential claims against Penn Central), were not discharged in the Penn Central reorganization proceedings consummated in 1978, there being no court of appeals decision to the contrary.

RULE 29.6 STATEMENT

Respondent USX Corporation has no parent companies and, with the exception of RMI Titanium Company (less than fifty percent of the voting shares of which are owned by USX Corporation), it has no nonwholly owned subsidiaries. The parent company of Respondent Bessemer and Lake Erie Railroad Company is Transtar, Inc. Respondent Bessemer and Lake Erie Railroad Company has no nonwholly owned subsidiaries.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1547

In the Matter of:
Penn Central Transportation Company

AMERICAN PREMIER UNDERWRITERS, INC.,
Petitioner,

v.

USX CORPORATION and BESSEMER and
LAKE ERIE RAILROAD COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents USX Corporation and Bessemer and Lake Erie Railroad Company ("B&LE") urge the Court to deny the petition for a writ of certiorari, which seeks review of a decision construing Section 77 of the Bankruptcy Act of 1898, formerly codified at 11 U.S.C. § 205 but repealed in 1978, as it applies to the reorganization in bankruptcy of Petitioner (then known as the Penn Central Transportation Company ("Penn Central")), which was consummated in 1978. The panel opinion of

the Court of Appeals (Pet. App. B) is reported at 71 F.3d 1113 (3d Cir. 1995).

SUMMARY OF ARGUMENT

This case plainly does not merit the Court's review for two fundamental reasons: (1) the issue presented involves interpretation of Section 77 of the former Bankruptcy Act of 1898, which was repealed nearly twenty years ago, is rarely applicable, and is significantly different in relevant respects from current law under the Bankruptcy Reform Act of 1978 (11 U.S.C. §§ 101 *et seq.*) (the "Bankruptcy Code"); and (2) the decision by the Third Circuit below does not conflict with any decision by another court of appeals.

Review of this case, arising under Section 77 of the former Bankruptcy Act, would likely have little if any impact on Bankruptcy Code cases. There are a number of important differences between the former Bankruptcy Act and the current Bankruptcy Code that relate to the issue presented in this case. For example, the Code has provisions addressing contingent contribution claims and future tort claims. The former Act did not have any such provisions. Moreover, the Bankruptcy Code provides a new definition of "claim" which Congress specifically intended to be broader than the definition of claim in the former Section 77. This case is therefore not an appropriate vehicle for resolving issues under the current Bankruptcy Code.

Despite Petitioner's misstatements, the decision below applied federal bankruptcy law (*not* a state statute of limitations) in holding that B&LE did not have contingent bankruptcy claims for contribution or indemnity against Penn Central. Counsel is unaware of any decision by any court of appeals finding a contingent bankruptcy claim for contribution or indemnity to have existed (under the repealed Bankruptcy Act or the current Bankruptcy Code) where the claimant lacked fair notice of the existence of such a claim. The Third Circuit did not

hold irrelevant, but rather rejected as factually baseless, Petitioner's contention that B&LE had fair notice of potential contribution or indemnity claims against Penn Central prior to consummation of the Penn Central reorganization—years before B&LE was first sued by any antitrust plaintiff.

Petitioner repeatedly but wrongly asserts that the Third Circuit held below that a bankruptcy claim "exists *only* when it accrues under the vagaries of varying state statute of limitations principles." (Pet. at i) (emphasis added). Passing over the artificiality of such issue on its face (Petitioner fails to specify any "varying state statute of limitations principles" operative in this case, and the variability of the substantive law underlying various types of claims is a necessary concomitant to bankruptcy law), the decisive point is that Petitioner simply misstates the decision below.

The Third Circuit looked to Section 77 of the former Bankruptcy Act in concluding that B&LE did not have a claim—within the meaning of that Act—for contribution or indemnity prior to consummation of the Penn Central reorganization in 1978. In so finding, the Third Circuit determined as a threshold matter that B&LE's cause of action for contribution or common law indemnity first "existed" (could be brought) once the underlying antitrust claims had been brought against B&LE in the 1980s, even though the cause of action had not yet accrued so as to trigger the statute of limitations (which would occur upon payment of the underlying antitrust liability). However, the non-existence of such a cause of action during the Penn Central reorganization became controlling only after the Third Circuit had determined under *federal bankruptcy law* that B&LE did not have a "contingent" bankruptcy claim for contribution or indemnity.

The decision by the Third Circuit below, holding that B&LE's claim for contribution or indemnity arose after Penn Central's reorganization and was not discharged

under the former Section 77, does not conflict with any decision by another court of appeals. Petitioner seeks to manufacture a conflict by baldly asserting as a factual matter that B&LE was "on notice" of potential contribution and indemnity claims against Penn Central prior to consummation of its reorganization. (Pet. at 15.) However, the Third Circuit expressly rejected Petitioner's factual premise, holding that B&LE "could not have been expected to file a contingent claim pre-consummation based on the speculative possibility that [its] conduct, which began in the 1950s, might have extended beyond the bounds of its statutory antitrust immunity and that [it] might successfully be sued years later." 71 F.3d at 1117. In an earlier case, the Third Circuit had held, consistently with other courts of appeals decisions cited by Petitioner, that contingent bankruptcy claims do arise when a potential claimant does in fact have "knowledge of them before confirmation of a reorganization plan," even though no cause of action yet exists. *In re Remington Rand Corp.*, 836 F.2d 825, 827 (3d Cir. 1988).

The Seventh Circuit is the only circuit court, besides the Third Circuit below, to consider whether a contribution or common law indemnity claim is discharged under Section 77 of the repealed Bankruptcy Act. Like the Third Circuit, and relying on Third Circuit precedent, the Seventh Circuit recently held that a contribution claim could not have been asserted or discharged in a railroad reorganization under the former Section 77 because the claimant could not have anticipated the underlying liability (arising under a state statute enacted after the reorganization). *See In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 3 F.3d 200 (7th Cir. 1993), *after remand*, 78 F.3d 285 (7th Cir. 1996). The other circuit court cases cited by Petitioner involve different types of claims, different statutory provisions, and different factual circumstances, and thus are readily reconciled with the decision below. No other court of appeals has rendered a decision in conflict with the decision below by the Third Circuit.

ARGUMENT

I. THIS CASE TURNS ON INTERPRETATION OF THE BANKRUPTCY ACT OF 1898, WHICH WAS REPEALED ALMOST TWENTY YEARS AGO AND DIFFERS SIGNIFICANTLY FROM THE CURRENT BANKRUPTCY CODE.

This case is governed by Section 77 of the former Bankruptcy Act of 1898, which was repealed in 1978—some eighteen years ago. Counsel is unaware of a single railroad reorganization case which is still pending under the former Act. Cases presenting issues under this repealed Act are rare. Moreover, as discussed below, there are a number of significant differences between the repealed Act and the current Bankruptcy Code which go to the heart of the issues presented in this case. Accordingly, despite Petitioner's urgings to the contrary, this case is a particularly "unsuitable vehicle" (Pet. at 18) for resolving any issues under the current Bankruptcy Code.

A. Section 502(e) of the Code: Contribution and Indemnity.

If an issue relating to bankruptcy claims for contribution or indemnity otherwise merited this Court's review, a case arising under the current Bankruptcy Code would be more suitable because in enacting the Code, Congress spoke directly to that subject. *See* 11 U.S.C. § 501(b), § 502(e), §§ 509-510. Under the Code, a bankruptcy court "shall disallow any claim for reimbursement or contribution . . . to the extent that . . . such claim . . . is contingent . . . ." 11 U.S.C. § 502(e)(1)(B). The Bankruptcy Code also requires that a claim for contribution or indemnity be disallowed to the extent the underlying claim is disallowed. 11 U.S.C. §502(e)(1)(A). No such provisions govern reorganizations under former Section 77.

B. Section 524(g) of the Code: Post-Petition Injury Caused by Pre-Petition Acts.

In holding that B&LE lacked any bankruptcy claim for contribution or indemnity against Penn Central, the Third Circuit relied upon its decision in *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985). In *Schweitzer*, the Third Circuit held that railroad workers exposed to asbestos prior to railroad reorganizations, but not manifesting any asbestos injury until thereafter, lacked bankruptcy claims which could be asserted or discharged in a reorganization under Section 77 of the former Bankruptcy Act.

In 1994, Congress enacted Section 524(g) of the Bankruptcy Code, which includes a provision that a demand for payment for asbestos injury manifesting itself only post-petition, although arising out of the "*same . . . conduct or events*" that gave rise to bankruptcy claims for *prepetition* asbestos injuries, is "*not a claim*" under the Bankruptcy Code. 11 U.S.C. § 524(g)(5) (emphasis added).[1] Section 524(g)(5) has no counterpart under Section 77 of the former Bankruptcy Act.

C. Section 101(5) of the Code: Definition of "Claim".

Even putting aside the specific Code provisions discussed above, Petitioner is still wrong in asserting that the "meaning of claim under Section 77, governing railroad reorganizations, . . . is essentially the same as in the Bankruptcy Code" under 11 U.S.C. § 101(5). (Pet. at 18-19 n.5). In enacting Section 101(4) of the Code (currently codified at 11 U.S.C. § 101(5)), Congress declared that it was an "even broader definition of claim than is found in the present debtor rehabilitation chapters."[2] *See Johnson v. Home State Bank*, 501 U.S. 78,

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[1] *See generally* H.R. Rep. No. 835, 103d Cong., 2d Sess. 40-41 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3348-50.

[2] S. Rep. No. 989, 95th Cong., 2d Sess. 21-22 (1978); *reprinted in* 1978 U.S.C.C.A.N. 5787, 5807-08; H.R. Rep. No. 595, 95th Cong., 1st Sess. 309 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6266.

86 (1991) (focusing upon the above-quoted legislative history). *See also In re Chateaugay Corp.*, 53 F.3d 478, 497 (2d Cir.), *cert. denied*, 116 S. Ct. 298 (1995) ("[Section 77 of] the old Bankruptcy Act . . . used a narrower definition of 'claim' than the new Bankruptcy Code"). Indeed, the definition of "claim" under Section 77 of the former Bankruptcy Act which controls here—unlike the definitions of "claim" in other sections of the former Bankruptcy Act and in Section 101(5) of the Bankruptcy Code—did not even refer to "contingent" claims.[3]

At oral argument below, Petitioner itself urged that the definition of "claim" was *materially different* under Section 77 of the former Bankruptcy Act than under the Bankruptcy Code. Petitioner suggested that the Bankruptcy Code definition was somehow narrower, notwithstanding the express intent of Congress, in enacting the Code, to adopt the "broadest possible definition" of "claim."[4] In rejecting this strained argument, the Third Circuit observed that while its decision in *In re M. Frenville Co., Inc.*, 744 F.2d 332 (3d Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985), involved the Code, rather than Section 77 of the Act, this was a "distinction without a difference" in the applicability of *Frenville*, given the breadth of the Code definition of "claim." 71 F.3d at 1117. Having recognized that the Bankruptcy Code definition of "claim" was at least as broad as the definition under former Section 77, it was simply unnecessary for the Third Circuit to go further and hold that the Code definition was in fact broader.

Petitioner likewise errs in asserting that the Third Circuit decisions in *Frenville*, *Schweitzer*, and *In re Penn*

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[3] *Compare* 11 U.S.C. § 205(b) (repealed 1978) *with* 11 U.S.C. § 506(1) (repealed 1978) *and* 11 U.S.C. § 101(5).

[4] S. Rep. No. 989, 95th Cong., 2d Sess. 22 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5808; H.R. Rep. No. 595, 95th Cong., 1st Sess. 309 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6266.

Cent. Transp. Co., 944 F.2d 164 (3d Cir. 1991) ("*Paoli Yard*"), *cert. denied*, 503 U.S. 906 (1992), "recognize[] no difference between reorganization under Section 77 of the Act or the Code as to the existence of a claim." (Pet. at 5). *Schweitzer* engaged in an in-depth analysis of the existence of a claim under Section 77 of the Act, just as *Frenville* carefully examined the meaning of a claim under the Bankruptcy Code. Neither court had any reason to examine other statutory provisions which did not apply. *Paoli Yard*, a Section 77 case, relied heavily on *Schweitzer*, and contains no reference to *Frenville*. Accordingly, the decision below, relying on *Schweitzer* and *Paoli Yard*, expressly noted that it had already addressed the issue of dischargeability in that Section 77 context. 71 F.3d at 1115. The Third Circuit explicitly held that while *Frenville* was supportive, it was "not necessary" to its decision below. *Id.* at 1117.

For all of the reasons discussed above, review of this Section 77 case under the repealed Bankruptcy Act would likely have little impact on the vast majority of bankruptcy cases, in view of the significant differences between Section 77 of the former Act and the current Code.

II. THIS CASE DOES NOT PRESENT ANY CONFLICT AMONG THE CIRCUITS.

In an effort to distract this Court from the narrow issue addressed by the court below, Petitioner attempts to create an impression that the Third Circuit rendered a decision of almost universal application to Bankruptcy Code cases. In fact, the Third Circuit engaged in a focused analysis of whether B&LE's contribution and common law indemnity claims arose post-consummation and, therefore, were not discharged under Section 77 of the former Bankruptcy Act. To assist it in its construction of the Section 77 definition of "claim," the court below reviewed six other Section 77 cases to align its decision with precedents regarding when a claim arises under the former

Bankruptcy Act.[5] In fact, the court relied almost exclusively on these Section 77 cases and cited only one Bankruptcy Code decision as further support which was "not necessary" to its holding. *See id.* at 1117 (citing *Frenville*). Thus, it is eminently clear that the decision below focuses solely on when a contribution or indemnity claim is discharged under the former Section 77, an issue addressed by only one other court of appeals (the Seventh Circuit)—which expressly *agreed* with the Third Circuit.[6]

A. Petitioner Misstates the Decision Below.

Petitioner repeatedly, but erroneously, asserts that the Third Circuit held below, and in other decisions, that "a claim exists" for federal bankruptcy purposes "*only* when it accrues under the vagaries of varying state statute of limitations principles." (Pet. at i) (emphasis added). (*See also id.* at 3, 5-7, 13-14.) To the contrary, the Third Circuit applied an analysis that is fully consistent with all of the arguably relevant decisions by other courts of appeals.[7]

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[5] *See* 71 F.3d at 1115-16 (relying on precedents set in *Schweitzer, supra; Paoli Yard, supra; In re Radio-Keith Orpheum Corp.*, 106 F.2d 22 (2d Cir.), *cert. denied*, 308 U.S. 622 (1939); *In re Reading Co.*, 404 F. Supp. 1249 (E.D. Pa. 1975); *In re Central R.R. Co.*, 950 F.2d 887 (3d Cir. 1991), *cert. denied*, 503 U.S. 971 (1992); and *Zulkowski v. Consolidated Rail Corp.*, 852 F.2d 73 (3d Cir.), *cert. denied*, 488 U.S. 994 (1988)).

[6] *See* part II.B.1.a., *infra*.

[7] Moreover, while Petitioner refers to the supposed "vagaries of varying state statute of limitations principles" (Pet. at i), Petitioner fails to specify any such varying principles which are implicated in this case (involving claims for contribution and common law indemnity). Moreover, the variability of substantive law underlying various types of claims is a necessary incident of bankruptcy law, particularly "[s]ince most bankruptcy claims arise under substantive state law." (Pet. at 3.) *See Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 161 (1946). *See also id.* at 171 (Frankfurter, J., concurring). Thus, the issue raised by Petitioner is artificial on its face.

Under the Third Circuit's analysis below, whether a claim had "accrued" for purposes of triggering the statute of limitations under nonbankruptcy law is simply and unassailably a *threshold* test for determining whether a claim existed for purposes of bankruptcy proceedings. *See* 71 F.3d at 1114-15 (citing *Schweitzer* and *Frenville*). As the Third Circuit observed in *Schweitzer*, it is "undisputed" that if a cause of action had accrued under the substantive nonbankruptcy law (which was federal law in that case, as in many other cases), then a claim must have existed for bankruptcy purposes. 758 F.2d at 941. But the Third Circuit explicitly did *not* hold the reverse, *i.e.*, that if no cause of action had accrued under nonbankruptcy law, then no bankruptcy claim could exist. *Id.* at 942-43.[8]

The second step in the Third Circuit's analysis of whether a bankruptcy claim existed is a determination of whether a cause of action could have been brought (even if it had not yet accrued so as to trigger the statute of limitations) under the relevant nonbankruptcy law. The Third Circuit concluded: "We agree with appellants that their claims for contribution and indemnity could not accrue until the MDL 587 complaints were filed against them." 71 F.3d at 1114-15.[9] In *Frenville*, which

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[8] *See also Paoli Yard*, 944 F.2d at 167 (summarizing *Schweitzer*); *In re Remington Rand Corp.*, 836 F.2d 825, 826, 831-32 (3d Cir. 1988) ("in drafting the [bankruptcy] Code to reach nearly every type of claim, Congress necessarily included" the "more traditional legal cause of action," but "we recognize that a party may have a bankruptcy claim and not possess a cause of action on that claim" (citing *Schweitzer*)); *Frenville*, 744 F.2d at 836-37 & n.8 (looking to state law only *after* concluding that no prepetition contingent claim existed under federal bankruptcy law, and only in the absence of any other "overriding federal policy" (such as may arise from a mass tort)).

[9] Indeed, contrary to Petitioner's suggestion, there is virtual *uniformity* under both federal and state law that a cause of action for contribution or indemnity arises at the time the triggering

involved applicability of the automatic stay, the Third Circuit did *not* hold, as Petitioner asserts, that bankruptcy claims for contribution and indemnity could not exist until, upon payment of the underlying tort claims, they had accrued for statute of limitations purposes. (Pet at 5-6). Rather, *Frenville* held that such contribution and indemnity claims were not cognizable in bankruptcy until the underlying tort claims had been brought, and the cause of action for contribution and indemnity first existed. 744 F.2d at 335-37. No court of appeals has ever held to the contrary.

The conclusion below that B&LE's cause of action for contribution and indemnity did not exist under nonbankruptcy law prior to consummation of the Penn Central reorganization "*frame[d] the issue*", which was "whether a claim that *arose after* the 1978 Consummation Order was *nevertheless discharged* by that order." 71 F.3d at 1115 (emphasis added). Referring to its decision in *Schweitzer*, the Third Circuit noted that it had "already answered that question in the negative, at least in the context of the § 77 reorganization presented by this case." *Id.* (footnote omitted).

The third step of the Third Circuit's analysis below was to determine whether B&LE had "pre-consummation, *contingent*, dischargeable claims" under the former Bankruptcy Act, as distinct from nonbankruptcy law. *Id.* (emphasis added). In this regard, the Third Circuit looked to its prior decisions in *Schweitzer* and *Paoli Yard*, and to a lesser extent *Frenville*, all of which expressly recognized that a contingent bankruptcy claim *could* exist even though a cause of action did not yet exist under nonbankruptcy law. *Id.* at 1115-17 & n.3.

The Third Circuit recognized in this regard that "one can have an 'interest' which is cognizable as a contingent

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complaint is served, at which point such cause of action may be asserted in a cross-claim or third-party complaint. *See, e.g.*, Fed. Rules Civ. P. 13(g), 14.

claim under Section 77," even though "there was no present cause of action" under nonbankruptcy law, provided that "one must have a legal relationship relevant to the purported interest from which that interest may flow." *Id.* at 1116 (quoting *Schweitzer*, 758 F.2d at 943). As an example, the court pointed to a parent company's guaranty of lease payments by its subsidiary, which was held to give rise to a cognizable claim by the landlord in the parent's bankruptcy even though the subsidiary had not yet defaulted on the lease payments. 71 F.3d at 1116 (citing *In re Radio-Keith-Orpheum Corp.*, 106 F.2d 22 (2d Cir.), *cert. denied*, 308 U.S. 622 (1939)). Similarly, the Third Circuit recognized that a "classic" contingent bankruptcy claim arises at the moment when "parties agree in advance that one party will indemnify the other party in the event of a certain occurrence," even though no cause of action for indemnity arises under nonbankruptcy law unless and until the indemnified occurrence takes place. 71 F.3d at 1116 n.3 (quoting *Frenville*, 744 F.2d at 336-37).

In its decision below, the Third Circuit properly rejected Penn Central's contention that, like a guaranty or indemnity contract, the railroads' rate bureau agreement —approved by the Interstate Commerce Commission for purposes of antitrust immunity for collective ratemaking under former Section 5a of the Interstate Commerce Act (49 U.S.C. § 5b (1976))—constituted the type of pre-bankruptcy legal relationship that gave rise to contingent bankruptcy claims for contribution and indemnity. In the words of the Third Circuit:

> [T]he § 5a agreement confers no right of indemnification. That agreement, although the source of [B&LE's] primary liability to the MDL 587 plaintiffs, simply does not evidence an intent to look to the pre-reorganized Penn Central for contribution or indemnity claims. Put simply, although there was a legal relationship between the Bessemer and the Penn

> Central's predecessors, there was no legal relationship from which a prepetition interest in contribution or indemnity could flow. . . .
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> * * * *
>
> In *Paoli Yard*, we made explicit what was implicit in *Schweitzer*: it is not sufficient for dischargeability purposes that there was *some* pre-consummation legal relationship between the debtor and the party seeking now to assert a claim; rather, that relationship must be relevant to the claimant's cause of action.

71 F.3d at 1116-17 (emphasis in original). Thus, the decision below plainly does not, as Petitioner wrongly asserts, "remove[] th[e] category of [contingent] claims from bankruptcy law." (Pet. at 11.) The Third Circuit simply recognized that on the facts presented, Respondents' contribution and indemnity claims did not fall within that category.

Petitioner also erroneously assumes, as established fact, that at the time of the bankruptcy proceedings, B&LE "should fairly have contemplated such possible future claims" (Pet. at i), and was "on notice that it might have indemnity and contribution claims in the future." (Pet. at 15.) On this faulty factual premise, Petitioner wrongly asserts that the decision below conflicts with decisions by other courts of appeals which have recognized contingent claims in bankruptcy where claimants had ample notice that such claims might arise in the future. (*See id.* at i, 3-4, 14-15.)

To the contrary, the Third Circuit expressly *rejected* Petitioner's factual premise that B&LE was on fair notice of its contribution and indemnity claims prior to being sued by the antitrust plaintiffs, and prior to consummation of the Penn Central reorganization. The Third Circuit correctly held that B&LE "could *not* have been expected to file a contingent claim pre-consummation based on the speculative possibility that [its] conduct, which began in the 1950s, might have extended beyond the

bounds of its statutory antitrust immunity and that [it] might successfully be sued years later." 71 F.3d at 1117 (emphasis added). There is no reason to review this factual holding.[10]

The Third Circuit further observed in this regard that if B&LE were required to act with such "clairvoyance," then countless other entities that did business with Penn Central would also have been required to file "contingent claims," the resolution of which would have been "impossible," and the "uncertainty thus created" would render any reorganization plan "unworkable." 71 F.3d at 1117-18. There is no basis for Petitioner's naked contention that other courts of appeals would have concluded otherwise.

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[10] Indeed, in denying prejudgment interest in the antitrust case, the Third Circuit "agree[d] with the district court that B&LE had a reasonable expectation [even after it was sued] that it would not be liable to the plaintiffs." *In re Lower Lake Erie Iron Ore Antitrust Litig. (MDL-587)*, 998 F.2d 1144, 1181 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 921 (1994). The district court found that "very little of [the evidence] related to the defendant B&LE," and that there was a "legitimate argument that, regardless of the improprieties which may have been committed by the other defendants, the B&LE was not guilty of anti-competitive conduct." 759 F. Supp. 219, 234 (E.D. Pa. 1991). Moreover, in holding that the antitrust claims against Penn Central had been discharged, the reorganization court found no basis for concluding that Penn Central should have been aware of potential antitrust liability during its reorganization. *In re Penn Central Transp. Co.*, 42 B.R. 657, 666 (Bankr. E.D. Pa. 1984), *aff'd*, 771 F.2d 762 (3d Cir.), *cert. denied*, 474 U.S. 1033 (1985). The very same conduct that gave rise to antitrust liability in MDL-587 had previously been held by the Sixth Circuit to be immune from antitrust damage liability, based both on express statutory antitrust immunity as well as the filed rate doctrine of *Keogh v. Chicago & N. R. Co.*, 260 U.S. 156 (1922). *See Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1455-60 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988).

B. No Other Court of Appeals Has Reached a Different Result on Similar Facts.

Prior to this case, the Third Circuit had held—no less than the courts of appeals cited by Petitioner—that contingent claims arise under the Bankruptcy Code (even though no cause of action then exists under nonbankruptcy law) when the claimant "has *knowledge* of them before confirmation of a reorganization plan." *In re Remington Rand Corp.*, 836 F.2d 825, 827 (3d Cir. 1988) (emphasis added). The Third Circuit explained that "[o]nly then would the parties' 'legal relationship,' *see Schweitzer* . . ., be such that [a party] would be in a position to determine and assert [a contingent claim]." *Id.* at 833 n.7.

Finding such knowledge, the Third Circuit held in *Remington* that a contingent bankruptcy claim for breach of contract did exist, although no cause of action existed or accrued under nonbankruptcy law until after the reorganization. By the same token, the absence of such knowledge was central to the Third Circuit's determina- knowledge under bankruptcy law that no contingent tort claims had existed in *Schweitzer*,[11] and that no contingent CERCLA claims had existed in *Paoli Yard*.[12]

Thus, as elaborated below, there is no real confiict between the Third Circuit and other courts. of appeals

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[11] In *Schweitzer*, the Court assumed that although plaintiffs had been exposed to asbestos while working for railroads prior to their reorganization, no resultant injury had manifested itself until after the reorganizations. The Court concluded that it would be "absurd . . . to have expected plaintiffs, who allegedly had manifested no injury at the time of the reorganization proceedings, to file claims for such injury in those proceedings." 758 F.2d at 943.

[12] *Paoli Yard* involved contribution claims as well as direct claims under CERCLA which the claimants could not have anticipated because CERCLA was not enacted by Congress until after the railroad reorganization. The Third Circuit accordingly viewed the case as closely analogous to *Schweitzer*. *See* 944 F.2d at 167-68.

as to the legal standards for determining when "a contingent bankruptcy claim arises." At bottom, the different results in different cases upon which Petitioner seizes simply reflect the different factual contexts (and procedural postures) of the cases. There is no basis for concluding that any other court of appeals would have decided this case differently.

1. *The Seventh Circuit.*

a. *Milwaukee Road II.*

It is noteworthy that Petitioner ignores the one court of appeals decision outside the Third Circuit which addresses an issue similar to the one presented here—and reaches the same result as did the Third Circuit. *In re Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 3 F.3d 200 (7th Cir. 1993), *after remand*, 78 F.3d 285, 1996 U.S. App. LEXIS 3328 (7th Cir. 1996) ("*Milwaukee Road II*"). That case, like this one, involved the issue of whether a contingent bankruptcy claim for contribution had existed and was discharged in a railroad reorganization under Section 77 of the repealed Bankruptcy Act. The Seventh Circuit "joined other courts, *e.g.*, the . . . Third Circuit" in holding that the contribution claim had not been discharged because claimant could not have anticipated the underlying liability (based on a state environmental clean-up statute enacted after the reorganization). 1996 U.S. App. LEXIS at *4 (citing *Paoli Yard*). *See also* 3 F.3d at 205 (claimant "could not possibly have known of its liability" (quoting the district court)). It is therefore clear that the Seventh Circuit is not at odds with the Third Circuit decision in this case.

b. *Milwaukee Road I.*

Only one of the decisions which Petitioner cites as in conflict with the decision below involved Section 77 of the former Bankruptcy Act, rather than the current Bankruptcy Code. That decision, *In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 974 F.2d 775 (7th

Cir. 1992) ("*Milwaukee Road I*"), is by no means "squarely in conflict" with the decision below. (Pet. at 13.) Indeed, *Milwaukee Road I* followed the analytic approach of the Third Circuit by considering both whether a cause of action existed under nonbankruptcy law and whether a contingent claim existed under bankruptcy law.[13]

The Seventh Circuit held in *Milwaukee Road I* that when a potential claimant under CERCLA became aware that the debtor was responsible for hazardous substance contamination, and received preliminary soil test results, a contingent CERCLA claim arose.[14] As explained above, the Third Circuit did not take a contrary position below, but rather simply concluded that B&LE lacked any fair notice of its potential contribution and indemnity claims against Penn Central until years after consummation of the Penn Central reorganization, when B&LE itself was first sued by the antitrust plaintiffs.

In undertaking an extensive review of relevant case law in *Milwaukee Road I*, including the Third Circuit decisions in *Schweitzer* and *Paoli Yard*, the Seventh Cir-

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[13] *See* 974 F.2d at 780-81 ("It is clear that a cause of action constitutes a claim under Section 77," but "a party may have [a] preconsummation 'contingent claim' . . . under Section 77 even before the party has a cause of action" (citing *Schweitzer*)). *See also id.* at 785 ("We agree that CERCLA is the *starting point* for determining when a CERCLA claim arises in a Section 77 bankruptcy," but "the fact that response costs are necessary for an actual claim to accrue under CERCLA does not necessarily mean that such costs are necessary for a contingent CERCLA claim to accrue under Section 77" (emphasis added)).

[14] "[W]hen a potential CERCLA claimant can *tie* the bankruptcy debtor to a *known* release of a hazardous substance which this potential claimant *knows* will lead to CERCLA response costs, and when this potential claimant has, in fact, conducted *tests* with regard to this contamination problem, then this potential claimant has, at least, a contingent CERCLA claim for purposes of Section 77." 974 F.2d at 786 (emphasis added). *See also Milwaukee Road II*, 3 F.3d at 203-07 (similar result reached by the Seventh Circuit on similar facts).

cuit never suggested any conflict with Third Circuit law. Rather, the Seventh Circuit observed that the law was evolving *harmoniously*, pointing out that the "determination of when a party has a claim or contingent claim seems to hinge"—appropriately so—"on the nature of the claim and the posture of the case." 974 F.2d at 781.

In respect of the "nature of the claim," the Seventh Circuit did not quarrel with the proposition drawn from *Schweitzer* that "this differential treatment is justified for several reasons, one being that a tort claimant, unlike the contractual claimant, is *not always aware* that it has a legal relationship with the debtor which gives rise to the claim until years after the tortious act." *Id.* (emphasis added).

In respect of the "posture of the case," the Seventh Circuit distinguished two scenarios: one in which a party first acquires knowledge of its claim against the debtor *during* the bankruptcy proceedings, and one in which such knowledge is first acquired *after* the bankruptcy proceedings. *Id.* at 782. As to the first scenario, the Seventh Circuit recognized policy reasons (particularly under the current Bankruptcy Code rather than the former Bankruptcy Act) for finding that bankruptcy claims existed at an earlier point in time (there being little or no justification for allowing a knowledgeable claimant to evade an ongoing bankruptcy process and seek treatment superior to similarly situated creditors). *Id.* at 781-83.

As to the second scenario, however, the Seventh Circuit observed—consistently with *Schweitzer, Paoli Yard,* and the decision below—that "the equities arguably run the other way." *Id.* at 782. If a party "did not know" until after the bankruptcy proceedings that it had a bankruptcy claim, it would be "forever barred from raising this claim against the individual debtor, reorganized company, or its successors," without ever having a realistic opportunity to assert its claim. *Id.* (citing *Schweitzer*). In this scenario, the Seventh Circuit saw "no reason . . .

to adopt a standard which has the potential of cutting off future creditors' claims even though these creditors had no reason to know" of their bankruptcy claims. *Id.* at 784. As the Seventh Circuit recognized in *Milwaukee Road I*, and as demonstrated below, any apparent "divergence" in the standards employed by the courts in this regard may well be "attributable to the varied posture of these cases" rather than to any real or lasting conflict. *Id.* at 783.

2. *The Ninth Circuit.*

Groping to find a conflict among courts of appeals, Petitioner also relies upon *In re Jensen*, 995 F.2d 925 (9th Cir. 1993). (*See* Pet. at 13-14). However, *Jensen* involved facts similar to those presented in *Milwaukee Road I*, and reached a similar result.[15] *Jensen* no more conflicts with the decision below than does *Milwaukee Road I*, which was approved in *Jensen*. 995 F.2d at 930-31. The Ninth Circuit in *Jensen* also discussed—but did not quarrel with—the Third Circuit decisions relied upon below, *Schweitzer* and *Paoli Yard*, which were perceived by the Ninth Circuit as the most relevant Third Circuit authorities on whether contingent bankruptcy claims had arisen and were discharged. *Id.* at 929.

3. *The Fourth Circuit.*

a. *The* Grady *Case.*

Neither the Third Circuit's decision in this case, nor the *Schweitzer* decision upon which it relies, conflicts with *Grady v. A.H. Robins Co.*, 839 F.2d 198 (4th Cir.), *cert. dismissed*, 487 U.S. 1260 (1988). Both *Schweitzer* and the decision below involved the dischargeability of post-reorganization claims under the former Bankruptcy

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[15] "We conclude that the state had sufficient knowledge of the Jensens' potential liability to give rise to a contingent claim for cleanup costs before the Jensens filed their personal bankruptcy petition. . . ." *Id.* at 931.

Act, rather than ongoing proceedings under the current Bankruptcy Code, as in *Grady*.[16] The Fourth Circuit itself "emphasize[d] the narrowness" of its holding in *Grady*, which reached only the applicability of the automatic stay to the "claim in the case before us," and not the priority or dischargeability of that claim. 839 F.2d at 199, 203. Further, the Fourth Circuit repeatedly stressed that its holding in *Grady* was anchored in the language and legislative history of the current Bankruptcy Code. *Id.* at 200, 202-03.

b. *The* Butler *Case.*

Petitioner is also wrong in asserting a conflict between the decision below and the decision in *Butler v. NationsBank, N.A.*, 58 F.3d 1022 (4th Cir. 1995). (Pet. at 11-12). *Butler* is unlike any of the cases discussed above in that all of the elements of the bank's tort cause of action against the debtor indisputably existed pre-petition, when the debtor deposited a fraudulently endorsed check with the bank and the bank credited the debtor's account based on the forgery. 58 F.3d at 1029. The Fourth Circuit rejected the bank's contention that its claim did not arise until it received post-petition notice of the forgery.

Far from creating any conflict with Third Circuit bankruptcy cases, the *Butler* case is analogous to the Third Circuit decision *In re Penn Cent. Transp. Co.*, 771

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[16] The Seventh Circuit suggested in *Milwaugee Road I* that the holding affirmed in *Grady* is confined to *ongoing* proceedings under the *Code*—a context in which that holding is arguably both necessary to reorganization and fair to claimants against the debtor—and could not properly be extended to cases (as here) involving consummated proceedings under the former Act. 974 F.2d at 781-84. Unlike the present case or the *Schweitzer* case, the bankruptcy court in *Grady* had established a class of "Future Tort Claimants," consisting of virtually all users of the debtor's defective contraceptive device, the Dalkon Shield, and they were each notified that they may have bankruptcy claims if and when they became aware of resultant injury. *Grady*, 839 F.2d at 202.

F.2d 762 (3d Cir.) ("*Pinney Dock*"), *cert. denied*, 474 U.S. 1033 (1985). In *Paoli Yard*, the Third Circuit rejected a contention that *Pinney Dock* was inconsistent with its decisions in *Schweitzer* or *Paoli Yard*, explaining:

> In *Pinney Dock*, a party was refused permission to pursue an antitrust claim against [Penn Central] for alleged violations committed by [Penn Central] before the bankruptcy proceedings but apparently *not discovered* by the putative claimant until after the reorganization had been consummated. . . . The difference between *Pinney Dock* and the appeal before us is simply that in *Pinney Dock all of the factual and legal elements of the plaintiff's claim existed* prior to the consummation of the [Penn Central] bankruptcy.

944 F.2d at 168 (emphasis added). Consistent with *Butler*, the Third Circuit held in *Pinney Dock* that the unasserted claim had been discharged (finding no basis for relief on grounds of fraudulent concealment of the claim or inadequate notice of the bankruptcy proceedings). *Butler* is no less consistent with Third Circuit jurisprudence than is the analogous *Pinney Dock* case.

C. The Courts of Appeals Are Developing a Consistent Approach to the Type of Issues Presented Here.

It is at best a gross overstatement for Petitioner to assert that courts of appeals have adopted "myriad, divergent approaches" which result in "materially different determinations" as to whether contingent bankruptcy claims exist. (Pet. at i, 17.) To the contrary, a consistent approach is evolving. To date, there have been no "materially different determinations" by courts of appeals in similar factual and procedural contexts.

1. *Emerging Consensus on the "Fair Notice" Standard.*

The courts of appeals are in basic accord that a contingent bankruptcy claim may exist when, based upon a rele-

vant prebankruptcy relationship between the claimant and the debtor, the claimant is on fair notice of a potential claim against the debtor. *See, e.g., In re Remington Rand Corp.*, 836 F.2d at 827, 833 n.7 (Third Circuit: "sufficient knowledge to assert a potential claim" based on the parties' " 'legal relationship' " (citing *Schweitzer*)); *Milwaukee Road I*, 974 F.2d at 786 (Seventh Circuit: "when a potential CERCLA claimant can tie the bankruptcy debtor to a known release of a hazardous substance which this potential claimant knows will lead to CERCLA response costs"); *In re Jensen*, 995 F.2d at 930 (Ninth Circuit: " 'fair contemplation' test").

In each of those cases, claims asserted post-bankruptcy based on the prebankruptcy conduct of the formerly insolvent debtor were barred because, despite fair notice that the claims would likely ripen, claimants had failed to asesrt them as contingent bankruptcy claims. By contrast, in cases such as *Schweitzer, Paoli Yard,* and *Milwaukee II*, and in this case, where claimants lacked fair notice of such claims until after the bankruptcy proceedings, they were allowed to assert them against the reorganized companies.

2. *The So-Called "Conduct Test" Has Been Adopted Only in a Narrow Setting.*

Contrary to Petitioner's presentation (Pet. at 15-17), only *one* other approach has been adopted—tentatively—by a court of appeals, and only in a narrow context (wholly unrelated to the circumstances presented in this case) that makes it consistent with the "fair notice" approach. In the *Grady* case, the Fourth Circuit confronted *prospectively*—in ongoing bankruptcy proceedings—the type of dilemma that the Third Circuit in *Schweitzer* could address only retrospectively: that numerous victims of the debtor's mass tort (*i.e.*, the manufacture and sale of the defective Dalkon Shield in *Grady*; asbestos exposure in *Schweitzer*) would suffer manifest injury only

after commencement or completion of the bankruptcy proceedings.

Accordingly, the Fourth Circuit in *Grady* undertook to preserve the possibility (not available in *Schweitzer*) of an equitable resolution of *all* of the mass tort claims in the bankruptcy proceedings (where a class of Future Tort Claimants had been established), thereby promoting the debtor's reorganization consistently with fairness to claimants. Importantly, the future tort claimants in *Grady* were given actual, court-approved notice of their potential claims at the time of the bankruptcy proceedings, and were therefore positioned to seek compensation for Dalkon Shield injuries in those proceedings.

Nonetheless, the holding in *Grady* was narrow and tentative. The Fourth Circuit simply applied the automatic stay to "the Dalkon Shield claim in the case before us." 839 F.2d at 203. Significantly, the Fourth Circuit "emphasize[d] . . . that we do *not* decide whether or not Mrs. Grady's claim or those of the Future Tort Claimants are *dischargeable* in this case." *Id.* (emphasis added). Petitioner cites no other court of appeals decision applying the so-called "conduct test" (Pet. at 15-16),[17] nor any court of appeals decision rejecting it in a factual and procedural context similar to that presented in *Grady*.[18]

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[17] *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991), simply held that the EPA had contingent bankruptcy claims for recovery of its post-petition costs of cleaning up hazardous substances released by the debtor pre-petition, where the EPA had in fact filed claims for costs incurred prepetition (and the debtor had listed contingent liabilities for post-petition costs) in the debtor's ongoing bankruptcy proceeding. In view of EPA's knowledge of its imminent claims (*id.* at 1005), the Second Circuit saw no need to decide whether prepetition conduct that had not resulted in manifest injury could give rise to contingent bankruptcy claims. The Court observed, however, that adoption of such a "conduct test" would lead to "questionable results" and put "considerable strain . . . on the Code's definition of 'claim.'" *Id.* at 1003-04.

[18] The Third Circuit in *Schweitzer* appears to have left open the possibility that it might consider such an approach in such circum-

3. *"Pre-Petition Relationship Test" Is Not a Separate Approach.*

Contrary to Petitioner's suggestion, the so-called "pre-petition relationship test" is not a "divergent approach" to determining the existence of a contingent bankruptcy claim. (Pet. at 15-17) (citing *Epstein v. Official Comm. of Unsecured Creditors of Estate of Piper Aircraft Corp.*, 58 F.3d 1573 (11th Cir. 1995) ("*Piper*")). Rather, as recognized in *Piper*, a relevant prepetition relationship is simply a "threshold" component of the approach taken in *Grady* as well as the approach adopted in other cases discussed above. *Piper*, 58 F.3d at 1577-78 (citing, *inter alia*, *Grady*, 839 F.2d at 203; *In re Jensen*, 995 F.2d at 929-31; *In re Chateaugay*, 944 F.2d at 1003-04). In *Piper*, the Eleventh Circuit simply held that a class of "Future Claimants" who might be injured in the future as a result of unknown defects in aircraft manufactured and sold by the debtor, but who presently lacked any relevant relationship with the debtor (such as ownership of a plane made by the debtor), did not have bankruptcy claims against the debtor.

4. *Summary.*

No truly "divergent" approach—much less any clear conflict among circuits—has emerged which would warrant this Court's review. Moreover, this case—involving a long-consummated reorganization under the repealed Bankruptcy Act of 1898—would not in any event serve as an appropriate vehicle for the Court to address issues at the forefront of current bankruptcy law involving mass torts or environmental clean-up costs.

The courts of appeals have already struck (or are in the process of developing) a careful balance between the

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stances. *See* 758 F.2d at 944 n.1 ("Because this case does not present the question of what provision in a reorganization plan, if any, could be made for future claims such as these (*e.g.*, reserve or sinking funds, insurance, annuities, etc.), we do not address that issue here").

competing bankruptcy policies of "maximizing the creditor's interests in receiving payment and the debtor's interest in a fresh start." *Milwaukee Road I*, 974 F.2d at 779. The decision below is consistent with that balance. It is consistent as well with Petitioner's position that a contingent bankruptcy claim should exist only "if the claimant has a reasonable basis to anticipate that such claim may arise in the future." (Pet. at 4). The Third Circuit recognized in this case that B&LE lacked any such reasonable basis. The court of appeals simply held that because B&LE had no claim for contribution or indemnity prior to consummation of the Penn Central reorganization in 1978, its present claims could not have been discharged in the reorganization proceedings.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 95-1547

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

In the Matter of:
Penn Central Transportation Company

AMERICAN PREMIER UNDERWRITERS, INC.,

Petitioner,

—v.—

USX CORPORATION and BESSEMER and
LAKE ERIE RAILROAD COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Petitioner American Premier Underwriters, Inc. ("Penn Central") submits this reply in further support of its request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on December 12, 1995.[1]

[1] Penn Central has included the listing required by Supreme Court Rule 29.6 in its Petition for a Writ of Certiorari, dated March 25, 1996, at Appendix A.

I. RESPONDENTS ERRONEOUSLY ASSERT THAT THE PETITION PRESENTS A QUESTION OF LIMITED APPLICATION.

Respondents mischaracterize the petition as presenting solely an issue of interpretation of the "rarely applicable" former Bankruptcy Act, and therefore a question of relative unimportance. *See* Opp. Br. at 2. To the contrary, this petition presents a sharp and well-defined conflict in the circuits that has caused federal courts to apply non-uniform and disparate tests for determining when a claim arises in any bankruptcy, regardless of whether the case is under the Act or the newer Bankruptcy Reform Act of 1978 (the "Bankruptcy Code"). In this case, for example, respondents' $600 million claim would have been barred by at least the Fourth, Seventh and Ninth Circuits. *See* Petition at 14-15. The Third Circuit, however, permitted the claim to proceed because it defines the existence of a claim differently, applying a non-bankruptcy law accrual standard instead of bankruptcy principles. As the Court below stated:

> We look to nonbankruptcy law to determine when these claims accrued.

71 F.3d 1113, 1114 (3d Cir. 1995).

Contrary to respondents' contentions, the text of the Bankruptcy Act is irrelevant to the Third Circuit's accrual standard. That Court "look[s] to nonbankruptcy law" in all bankruptcy cases. The Third Circuit supported its statement of the accrual standard by citing to both a Bankruptcy Act case—*Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985)—and a Code case—*In re M. Frenville Co.*, 744 F.2d 332 (3d Cir. 1984), *cert. denied*, 496 U.S. 1160 (1985).[2] The Court below also

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[2] The Third Circuit has also applied the accrual standard in other Bankruptcy Act and Code cases, without drawing any distinction based upon which bankruptcy statute applied. *Compare In re Penn Central Transp. Co. (Paoli Yard)*, 944 F.2d 164 (3d Cir. 1991) (look to federal

expressly rejected the argument (made by petitioner) that there was any difference between the statutes relevant to the issue of when a claim arises:

> [The distinction urged by Penn Central to avoid application of the Third Circuit's accrual standard from *Frenville*] is a distinction without a difference. . . . Penn Central [cannot] explain how these two definitions differ and why that difference should lead us to a different result here than in *Frenville* [a Code case].

71 F.3d at 1117. Accordingly, the principle at issue on this petition is not limited to cases under the Bankruptcy Act; it has broad application to all bankruptcy cases.

II. RESPONDENTS DISTINGUISH CASES FROM OTHER CIRCUITS THAT ARE IN DIRECT CONFLICT WITH THIS CASE ONLY BY OVERLOOKING THE FUNDAMENTAL PREMISE OF THE THIRD CIRCUIT'S DECISION.

The starting and ending point of the decision below was the Third Circuit's non-bankruptcy law accrual standard. The Court found—and it was undisputed—that "[t]he predicate conduct of [respondents'] antitrust liability began before Penn Central filed its bankruptcy petition." 71 F.3d at 1114. Nevertheless, the Court ruled that respondents' claims had not accrued until years after consummation of the bankruptcy based upon its "look to nonbankruptcy law"—in this case, contribution and indemnification principles under Ohio law. As the Court stated: "That conclusion frames the issue that . . . is now before us . . . ." 71 F.3d at 1115. In effect, there was no issue left to decide after the determination that

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environmental statute to determine when a claim accrued under the former Bankruptcy Act), *cert. denied*, 503 U.S. 906 (1992) *with In re Remington Rand Corp.*, 836 F.2d 825 (3d Cir. 1988) (look to federal Contract Dispute Act to determine when a claim accrued under the Bankruptcy Code).

respondents' claims had not accrued prior to the bankruptcy discharge.

By ignoring the legal principle that was the linchpin of the decision below, namely the accrual standard, and by claiming that each court's decision was fact bound, respondents argue that the cases cited in the petition do not conflict with the Third Circuit. In fact they do. Other circuits have explicitly criticized the Third Circuit's "look to nonbankruptcy law" to define a claim and have rejected it in favor of a broader, plainly different standard. *See, e.g., Butler v. NationsBank, N.A.*, 58 F.3d 1022, 1029 (4th Cir. 1995) (explicitly declining to follow *Frenville*'s state law analysis and holding that "to determine when a claim arises for bankruptcy purposes, *reference is to be made to federal bankruptcy law rather than to state law*") (emphasis added); *In re Jensen*, 995 F.2d 925, 930 n.5 (9th Cir. 1993) (rejecting the Third Circuit's "right of payment theory" and noting commentators' "direct" criticism of that standard: " '*The determination of when a claim arises for purposes of bankruptcy law should be a matter of federal bankruptcy law and should not be governed by the particular state or nonCode federal law giving rise to the claim.*' ") (quoting Arlene E. Mirsky, et al., *The Interface Between Bankruptcy and Environmental Laws*, 46 Bus. Law. 623, 651 (1991)) (emphasis added); *Epstein v. Official Comm. of Unsecured Creditors*, 58 F.3d 1573, 1576 n.2 (11th Cir. 1995) (noting that a "majority of courts" have rejected the Third Circuit's "accrued state law claim theory" and stating "*[w]e agree with these courts and decline to employ the state law claim theory*") (emphasis added) (citations omitted).

III. THE COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS ON THE ACCRUAL STANDARD TO ENSURE A UNIFORM APPLICATION OF BANKRUPTCY PRINCIPLES.

The plainly divergent approaches by different courts for measuring the accrual of a bankruptcy claim can produce

inconsistent results on similar facts. *See* Petition at 14-15. The conflict also encourages forum shopping. *See, e.g., In re Chateaugay Corp.*, 1996 WL 117565, at *8 (S.D.N.Y. March 18, 1996) ("LTV contends that the defendants seek to withdraw the reference so that they can transfer the case to Pennsylvania where they will bask in the Third Circuit's creditor-friendly, narrow definition of a bankruptcy 'claim,' *see* [*In re M. Frenville Co.*] (holding that a bankruptcy claim does not arise until a right of action matures under applicable non-bankruptcy law), or at least dodge the Second Circuit's debtor-protective, expansive definition of 'claim'. . . .").

As evident from *Chateaugay*, the conflict in the circuits over when a bankruptcy claim arises is so clear and significant that debtors and creditors fighting over much smaller claims than those in this case will devote considerable resources to maneuver the case from one jurisdiction to another. The Court should resolve this conflict by articulating a single standard for determining when a claim arises in bankruptcy cases in order to prevent wasteful litigation and to ensure uniformity in such important determinations as which claims may be resolved in bankruptcy reorganizations, which claims are stayed from being asserted outside the bankruptcy proceedings and which claims are discharged.

Dated: May 3, 1996
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